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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BROWN & WILLIAMSON TOBACCO CORPORATION,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

The court below was called upon to review the narrow issue of the propriety of the District Court's order denying Petitioner's motion for a preliminary injunction and dismissing the complaint on jurisdictional grounds. Rather than simply denying Petitioner's request for preliminary relief and remanding the matter to the District Court for trial, the Sixth Circuit entered final judgment on the merits against Petitioner. The panel reached this highly improper and unusual result even though the only issue ever argued before both the Court of Appeals and the District Court was Petitioner's right to preliminary relief, even though there was never any factual hearing on the merits in the District Court, even though Petitioner did not have an opportunity to conduct discovery or cross-examine witnesses in order to prove the allegations of its complaint, and even though the District Court erroneously believed it did not have jurisdiction even to hear Petitioner's allegations.

The questions presented are:

1. May an appellate court, reviewing a denial of preliminary injunctive relief, proceed to enter judgment on the merits when no trial on the merits has yet been held and when the District Court never even addressed the merits of the complaint?

2. More particularly, did the Sixth Circuit's decision improperly preclude Petitioner from ever proving its claims through discovery and cross-examination at trial and deny the District Court the opportunity to decide the merits of the case in the first instance?

3. Should not this Court, in the exercise of its supervisory powers, correct this radical departure from the proper scope of appellate review mandated by this Court and uniformly observed by the courts of appeals?

LIST OF PARTIES IN THE COURT OF APPEALS

The parties in the Court of Appeals for the Sixth Circuit are those listed in the caption of this Petition. The Public Citizen Health Research Group filed a brief as amicus curiae. Brown & Williamson Tobacco Corporation is owned by BATUS, Inc., which in turn is owned by B.A.T Industries PLC. All of Brown & Williamson Tobacco Corporation's subsidiaries are wholly owned.*

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* A list of Brown & Williamson Tobacco Corporation's affiliates is annexed hereto as Appendix A.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Brown & Williamson Tobacco Corporation ("Brown & Williamson"), asks that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit, entered in this case on June 24, 1983.

Opinions Below

The opinion of the Court of Appeals, reported at 710 F.2d 1165 (6th Cir. 1983), is annexed hereto as Appendix B. The unreported memorandum opinion of the United States District Court for the Western District of Kentucky (Ballantine, J.) is annexed hereto as Appendix C. The Court of Appeals' order denying Petitioner's Petition for Reconsideration or Rehearing

with a Suggestion of Rehearing *en Banc*, not officially reported, is annexed hereto as Appendix D. The Court of Appeals' order is unofficially reported at 1983-2 Trade Cas. (CCH) ¶ 65,637 (Sept. 19, 1983).

Jurisdiction

The judgment of the Court of Appeals was entered on June 24, 1983. A timely Petition for Reconsideration or Rehearing with a Suggestion of Rehearing *en Banc* was denied on September 19, 1983. (App. D) This Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331(a), 2201-02, and 5 U.S.C. §§ 702-06.

Statute Involved

The relevant provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, are set forth in Appendix E hereto.

Statement of the Case

The Commission's Actions

On June 25, 1982, the Federal Trade Commission (the "Commission" or the "FTC")—in a radical departure from fifteen years of consistent agency practice—expelled Brown & Williamson's Barclay brand cigarettes from the FTC's official testing and reporting program.[1] Specifically, the Commission

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1 Since 1967, the FTC has operated a laboratory that measures the amount of various smoke constituents generated by cigarettes when they are "puffed" by a machine according to a standardized testing methodology that has come to be known as the "FTC method." The "tar", nicotine and carbon monoxide contents of the smoke of domestic cigarettes—as determined by the FTC method—are published periodically in an official FTC Report. According to a 1970 agreement between the industry and the Commission,

announced that (a) it would no longer test Barclay or include it in future FTC Reports "unless and until" the Commission changes the FTC method; (b) Brown & Williamson could no longer rely on the FTC method to substantiate claims as to Barclay's "tar" and nicotine yield; and (c) the December 1981 FTC Report, which had rated Barclay as a 1 mg "tar", 0.2 mg nicotine cigarette, would be amended to delete Barclay.

The District Court

Immediately upon learning of the FTC's decision, Brown & Williamson commenced an action in the United States District Court for the Western District of Kentucky to enjoin the FTC, temporarily and permanently, from taking the actions it had announced that day and to declare those actions unlawful under the Administrative Procedure Act (the "APA") and the United States Constitution. On the afternoon of June 25, the District Court (Circuit Judge Boyce F. Martin, sitting as District Judge by designation), issued a temporary restraining order to maintain the status quo until Brown & Williamson's motion for a preliminary injunction could be heard and determined.

In moving for preliminary injunctive relief, Brown & Williamson contended that the FTC's actions were unlawful under the APA, 5 U.S.C. §§ 551 *et seq.*, in that this radical change in the FTC's cigarette testing and reporting program amounted to substantive rulemaking which had been accomplished without following the procedures mandated by law. In addition, Brown & Williamson claimed that the FTC's actions were arbitrary, capricious and an abuse of discretion because, *inter alia*, they unfairly discriminated against Barclay.

For purposes of the preliminary injunction motion, the parties agreed to rely exclusively on affidavits and exhibits.

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print advertisements for cigarettes disclose the "tar" and nicotine content of the advertised brand, as published in the most recent FTC Report or as determined by the manufacturer using the FTC method.

There was no discovery taken, nor was there any evidentiary hearing on the preliminary injunction motion. The District Court did not consolidate the preliminary injunction hearing with a trial on the merits of Brown & Williamson's claims. The motion was submitted to the District Court solely on the papers, after oral argument was heard.

The District Court never reached the merits of Brown & Williamson's substantive arguments for enjoining the FTC's actions pending trial. Instead, on September 27, 1982, District Judge Ballantine held that the FTC's actions were not "final agency action" subject to judicial review under the APA, 5 U.S.C. §§ 702, 704. For that purely jurisdictional reason alone, the District Court held that Brown & Williamson was unlikely to succeed on the merits of its request for an injunction. The Court therefore denied preliminary relief and dismissed the complaint for want of jurisdiction.

The District Court's opinion was limited to the jurisdictional issue and did not address the other three elements required for a preliminary injunction: irreparable injury, balance of hardships and the public interest.

The District Court did, however, issue an injunction pending appeal to preserve the status quo until Brown & Williamson's appeal could be heard and determined. That injunction essentially continued in effect the temporary restraining order issued on June 25.[2]

The Appeal

Brown & Williamson based its appeal on the narrow jurisdictional question upon which the District Court had relied: whether the FTC's announced actions were final and reviewable. Brown & Williamson argued that, because the District Court entertained an erroneous view of the law of finality as applied to the facts of this case, the dismissal of the complaint

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2 A motion by the FTC to vacate the injunction pending appeal was denied by a panel of the Sixth Circuit on October 28, 1982.

and the denial of injunctive relief should be reversed, and the case remanded for further consideration of the motion for a preliminary injunction.

The Commission did not file a cross appeal. In its brief on appeal, it argued that the District Court's dismissal of the complaint and denial of preliminary relief were proper, on the ground that the FTC's June 25 actions did not constitute final agency action subject to judicial review. In the alternative, the Commission contended that if the Sixth Circuit were to hold that those actions were reviewable, the Court should not remand, but should proceed to review the merits of the motion and deny the preliminary injunction on the basis of the four-fold standard for preliminary injunctions enunciated by the Sixth Circuit in *Mason County Medical Association* v. *Knebel*, 563 F.2d 256 (6th Cir. 1977) ("*Mason County*").

Brown & Williamson's reply brief on appeal conceded that the Court of Appeals had the power to consider the merits of the preliminary injunction motion, but urged the Court to remand the case to allow the District Court to consider, in the first instance, whether the appropriate preliminary injunction standards had been met.

The Panel's Opinion

Oral argument on the appeal focused almost entirely on the finality issue—the basis of Brown & Williamson's appeal. Shortly thereafter, the Court of Appeals issued an order dissolving the injunction pending appeal on the basis of the four-part *Mason County* test. The opinion on the appeal, however, did not even mention *Mason County*.

The panel reversed the District Court's dismissal of the complaint, holding that the FTC's June 25 actions *were* final agency action subject to judicial review. At that point, the panel had two choices: remand the case to the District Court for decision on the preliminary injunction motion, or proceed to decide for itself whether Brown & Williamson had met the *Mason County* standard for preliminary injunctive relief. That

standard requires, first of all, finding that the movant has shown it is likely to succeed at trial in proving its case on the merits. At most then, the panel was entitled to affirm the District Court's denial of preliminary relief on grounds not addressed by the District Court itself.

The panel went further, however. It decided *not* that Brown & Williamson had failed to prove *likelihood* of success on the merits, but that the company had not succeeded on the merits. The panel took this extraordinary step despite the fact that Brown & Williamson had yet to exercise its rights to discovery and trial, including cross-examination, on the merits of its claims. In effect, the panel, *sua sponte*, improperly found facts and commented on the evidence as if there had been a record of a plenary litigation, and took the unprecedented step of entering judgment on the merits.

The panel disregarded the abbreviated nature of the preliminary injunction proceedings below and the limited scope of appellate review, and decided the merits of Brown & Williamson's substantive claims in the first instance.

Petition for Reconsideration

Brown & Williamson moved for reconsideration and rehearing of the Sixth Circuit's decision, arguing that the panel had exceeded the scope of appropriate appellate review and denied Brown & Williamson the opportunity to conduct discovery and to prove its claims at trial. Brown & Williamson also argued that the Sixth Circuit had entered judgment on the merits under the misapprehension that the company had consented to decision of its ultimate substantive claims on the limited record before the District Court. In fact, Brown & Williamson had simply consented to have the preliminary injunction motion decided on such a record.

The Court of Appeals denied Brown & Williamson's petition for reconsideration on September 19, 1983. It again ignored the narrow scope of review of a district court's denial of preliminary injunctive relief and reasoned instead that the

scope of appellate review extended beyond issues decided by the district court, allowing entry of final judgment. The panel avoided the serious problems of the lack of an evidentiary hearing below and the denial of Brown & Williamson's right to discovery and trial by again misconstruing the company's arguments on appeal. The panel erroneously stated that Brown & Williamson had fully consented to present its plenary case on the basis of the limited record filed in the District Court.

REASONS FOR GRANTING THE WRIT

I

THE SIXTH CIRCUIT'S DECISION EXCEEDED THE PROPER SCOPE OF REVIEW UNIFORMLY OBSERVED BY THE COURTS OF APPEALS

The panel's decision to enter final judgment on the merits of Brown & Williamson's substantive claims, rather than remand for trial, far exceeded the limited scope of review uniformly observed by the appellate courts. The established rule is that appellate review of a grant or denial of preliminary injunctive relief, because of the limits of the hearing below, is strictly confined to the propriety of the district court's decision.

One of the clearest explanations of this narrow scope of review is by the Sixth Circuit itself. In *SEC* v. *Senex Corp.*, 534 F.2d 1240, 1241 (6th Cir. 1976), the Court, in affirming a grant of preliminary injunctive relief, refused to reach the merits of the underlying claims, even though the parties had briefed and argued the appeal as if it were from a final judgment on the merits:

> While the hearing below was extensive, it was in no sense a final hearing and hence our role upon review is not to pass upon the final merits of the case, but rather whether the district judge abused his discretion in entering the order appealed from. . . .

While each of the parties in the appeal would like us to reach an immutable decision in his favor, our review must necessarily recognize that, as observed by Judge Jerome Frank in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953):

> "The judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness."

Accordingly, we believe that we should abstain from any discussion of the merits lest our premature comments lead counsel or the trial court to accept as final that which may, upon full hearing prove to have been incorrect.

534 F.2d at 1241. *Accord SEC* v. *G. Weeks Securities, Inc.*, 678 F.2d 649, 653 (6th Cir. 1982) (Ultimate legal questions should not be decided by appellate court reviewing a grant or denial of a preliminary injunction).

These principles have been followed by the other circuits as well in reviewing a district court's grant or denial of preliminary relief. *See, e.g.*, *The Continental Group, Inc.* v. *Amoco Chemicals Corp.*, 614 F.2d 351, 357 (3d Cir. 1980) ("Because the grant or denial of a preliminary injunction is based on a limited hearing that frequently produces an abbreviated set of facts . . . the scope of appellate review of the trial court's decision is necessarily narrow"); *Missouri Portland Cement Co.* v. *H.K. Porter Co.*, 535 F.2d 388, 392 (8th Cir. 1976) (Appellate court may not consider appellant's contentions on the merits where additional evidence remains to be presented in district court and additional discovery will be taken); *Allen* v. *Mississippi Commission of Law Enforcement*, 424 F.2d 285, 290 (5th Cir. 1970) (Despite appellants' contention that case

was ripe for final disposition, Court of Appeals would not consider ultimate merits of complaint); *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 111 (7th Cir. 1970) (Appellate court may not "at this juncture review the case in its entirety on the merits"); *Continental Oil Co.* v. *Frontier Refining Co.*, 338 F.2d 780, 781 (10th Cir. 1964) (". . . [O]ur review of an order granting or denying a preliminary injunction is limited to determining whether the trial court abused its discretion and, in making such a determination, the merits of the case may be considered only insofar as they have a bearing, if any, upon the question of sound judicial discretion"); *Young* v. *Motion Picture Association of America*, 299 F.2d 119, 121 (D.C. Cir.), *cert. denied*, 370 U.S. 922 (1962) (". . . [O]rdinarily this court will not consider the merits of the case further than necessary to determine whether [the district court's] discretion was abused"); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953) (Because of tentative nature of preliminary injunction, Court of Appeals could not determine whether district court should have dismissed complaint on merits). *See also Eikenberry* v. *Callahan*, 653 F.2d 632, 636 (D.C. Cir. 1981) (where "District Court's attention was focused almost entirely on the jurisdictional question," better practice is "to return the case to the District Court for it to determine for the first time the merits of the case").

The Sixth Circuit's decision in this case to grant judgment on the merits contravenes these principles and confuses the role of the appellate court when reviewing decisions on preliminary injunction motions with its role upon review of judgments on the merits after a full trial below. This Court, in the exercise of its supervisory powers, should grant certiorari to rectify the Sixth Circuit's departure from the proper scope of appellate review.[3]

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3 This Court has often granted certiorari to review similar questions of federal jurisdiction and procedure in order to ensure the proper and uniform functioning of the federal judiciary. *See, e.g., Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976) (District court's authority to remand case to state court and court of appeals' jurisdiction to review district court

II

THE SIXTH CIRCUIT IMPROPERLY DENIED BROWN & WILLIAMSON THE OPPORTUNITY TO CONDUCT DISCOVERY AND TO PROVE ITS CLAIMS AT TRIAL AND DEPRIVED THE DISTRICT COURT OF ITS POWER TO DECIDE THE MERITS IN THE FIRST INSTANCE

The Sixth Circuit's extreme departure from the accepted scope of appellate review resulted in two serious deprivations.

First, the Court's decision improperly precluded Brown & Williamson from ever proving its substantive claims through discovery and trial. The limited proceedings before the District Court on Brown & Williamson's motion for preliminary relief, consisting solely of oral argument and the submission of affidavits and exhibits, was no substitute for a full adversarial trial.

Brown & Williamson was never able to challenge at trial the fairness of the process by which the Commission decided to act against Barclay. There was no opportunity to probe the conclusions of the three FTC consultants upon which the Commission purported to rely for its June 25 determinations, to depose the consultants or FTC staff members, to cross-examine them in court, or to reveal to the court any error, inconsistency or bias in their judgments. More important, Brown & Williamson never had the chance to challenge, through discovery and cross-examination, its principal competitors in the tobacco industry who had submitted the data upon which the consult-

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order by mandamus); *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965) (Certiorari granted "[b]ecause of the threat to the goal of uniformity of federal procedure posed by the decision below"); *Sacher* v. *United States*, 343 U.S. 1, 4-5 (1952) (". . . [T]he importance of clarifying the permissible practice [under Rule 42(a) of the Federal Rules of Criminal Procedure] persuaded us to grant certiorari"); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947) (District court's power to dismiss action pursuant to doctrine of *forum non conveniens*).

ants and the Commission claimed to have relied. The denial by a trial or appellate court of a preliminary injunction does not limit or preclude the parties from fully litigating the merits of the case. *Berrigan* v. *Sigler*, 499 F.2d 514, 518 & n.11 (D.C. Cir. 1974). The panel's decision to reach the ultimate merits of Brown & Williamson's claims in spite of the inadequacy of the proceedings below was patently improper.

The second deprivation caused by the panel's failure to remand the case for trial was its denial of the District Court's opportunity to decide the merits of Brown & Williamson's substantive claims. While it is true that in some limited circumstances the appellate court may go beyond the specific issue presented on appeal in order to *review* a collateral decision of the district court, the panel here decided the merits of the case in the *first instance*—before they were fully developed or even considered by the court below. This extreme action is contrary to this Court's admonition in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975), that "the standard of appellate review is simply whether the issuance [or denial] of the injunction, in the light of the applicable standard, constituted an abuse of discretion." *Accord Brown* v. *Chote*, 411 U.S. 452, 457 (1973) (affirming grant of preliminary injunction where no abuse of discretion was found, refusing to address the ultimate merits of the underlying claim, and remanding for trial on the merits).

This Court should not permit such disregard of the standards which it has mandated for appellate review, especially where, as here, the result has a severe impact on the litigants and on the balance of roles in the federal judiciary.

III

THE SIXTH CIRCUIT'S OPINION WAS BASED ON AN ERRONEOUS INTERPRETATION OF THE LAW AND OF BROWN & WILLIAMSON'S ARGUMENTS ON APPEAL

The Court of Appeals' decision to rule on the merits of the case in the first instance rests on both an erroneous view of the proper scope of appellate review and a basic misunderstanding of Brown & Williamson's arguments on appeal.

The Sixth Circuit's Authorities Are Inapposite

The Court's first misinterpretation was of the law that governs the scope of appellate review. The authorities cited in the panel's opinion in support of its decision to grant final judgment on the merits are totally inapposite. (App. B, p. 12 n.3). The section from 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction*, § 3937 (1977), relates to the appellate court's exercise of pendent jurisdiction to review a collateral order of the district court, not independently appealable, to avoid further delay in the termination of the litigation. It has nothing to do with the power of an appellate court to decide the merits of a complaint when the only record is limited to an application for preliminary relief. In this situation, the panel in essence usurped the litigation below altogether and, in the process, prevented Brown & Williamson from exercising any of its rights to conduct that litigation.

The panel's reliance on *United States* v. *Criden*, 681 F.2d 919 (3d Cir. 1982) is also misplaced. In *Criden*, the Third Circuit chose to determine which portions of videotapes introduced at trial could be copied, rather than remand to the district court for a second time, in light of the lower court's failure to comply with the appellate court's "clear-cut instructions" on a prior remand of the same issue. 681 F.2d at 921-922. Here, the District Court never had an opportunity to decide the merits of Brown & Williamson's claims, because it

erroneously believed that it lacked the jurisdiction even to consider them. Thus, in addition to preventing Brown & Williamson from proving its claims through discovery and cross-examination, the panel also denied the District Court the opportunity to decide the merits of the case in the first instance.

The single case cited by the panel in its order denying Brown & Williamson's petition for reconsideration—*Hurwitz* v. *Directors Guild of America, Inc.*, 364 F.2d 67 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966)—also involved a situation entirely different from that facing the Sixth Circuit in this case. *Hurwitz* was an appeal from the denial of a preliminary injunction directing the defendant union to grant union membership to plaintiffs pending the outcome of their challenge to the union's requirement that members sign a non-Communist oath. The Second Circuit first set forth the established rule that "when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal." 364 F.2d at 70. The Court noted a narrow exception, however, where "the appellate court may dismiss the complaint on the merits if its examination of the record upon an interlocutory appeal reveals that the case is *entirely void of merit*." *Id.* (emphasis added). The Second Circuit reasoned that since the oath in question was "unreasonable *as a matter of law*" it had the power not only to reverse the denial of the preliminary injunction motion, but also to direct the district court to grant final relief to plaintiffs. *Id.* (emphasis added).

Here, the Sixth Circuit did not hold that Brown & Williamson's complaint was entirely void of merit *as a matter of law*. Rather, it improperly found facts and applied its conclusions of law to those facts to reach a final decision in favor of the Commission, without giving the District Court any opportunity to do so.[4]

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4 The cases cited in 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3921 (1977), to which the panel referred (App. D, p. 2), involved either dismissal by the court of appeals

Brown & Williamson did not Waive Its Right to Further Fact-Finding

The Court's second misinterpretation was of Brown & Williamson's arguments on appeal. The Sixth Circuit's opinion implies that Brown & Williamson agreed that the entire litigation could be resolved by the District Court based on the record before it and that no further fact-finding would ever be required (App. B, p. 12, n.3). The panel's denial of Brown & Williamson's petition for reconsideration was based on the same misapprehension. The panel stated that the company made a "complete turnabout" from its position on appeal that the Court of Appeals could decide the merits of the case, without further fact-finding below (App. D, p. 3). The panel, however, was mistaken.

In fact, Brown & Williamson had agreed only that the preliminary injunction motion could be resolved by the District Court without an evidentiary hearing. The FTC had submitted over 150 exhibits to the District Court (*see* App. C, p. 4 n.1) which, the Commission claimed, contained the entire "administrative record." Brown & Williamson never conceded that these exhibits contained everything the Commission had considered, or that the Commission had reviewed all the exhibits the FTC had submitted to the District Court (App. G, p. 17 n*).[5] Nevertheless, in the interests of expedition, Brown & Williamson agreed to make the showing required by *Mason County* on papers alone. But the company made no such agreement with respect to its rights to full discovery and trial on its complaint.

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where there was an "insuperable objection" to the complaint and defendant was entitled to judgment as a matter of law or review of a collateral decision by the district court that was "so far bound up with preliminary injunction orders as to warrant review on interlocutory appeal." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra*, § 3921, at 18-19. As discussed above (pp. 11-13), this case falls into neither of these two exceptions to the limited scope of appellate review.

5 Brown & Williamson's brief and reply brief on appeal are annexed to this Petition as Appendix F and Appendix G, respectively.

In appealing the District Court's jurisdictional decision, Brown & Williamson argued, inter alia, that the FTC's June 1982 actions were final and reviewable because judicial review would not interrupt an ongoing agency proceeding. The FTC had represented that its deliberations as to Barclay were terminated by its June 1982 determinations (App. F, p. 22 & n*). It was in this context that Brown & Williamson's initial brief on appeal—which focused exclusively on the finality issue—stated that its "challenges to the legality of the Commission's conduct raise purely legal issues that require no further factfinding at the *agency* level for clarification. The evidence upon which the Commission based its decisions is before the district court." (App. F, p. 3 (emphasis added)); *see also* App. F, p. 20 ("these challenges too present legal issues that will never be made more concrete or fit for judicial consideration by further *agency proceedings*" (emphasis added)).

Brown & Williamson never waived its right to further factfinding by the District Court before its claims for declaratory and permanent injunctive relief could be finally determined.

Indeed, when the Commission's brief on appeal raised factual issues that went to the merits of Brown & Williamson's claims, we urged the Sixth Circuit to remand after reversing on jurisdiction, rather than proceeding to decide even the preliminary injunction motion:

> This case is appropriate for remand. The FTC has raised fact issues regarding the 1970 agreement, notice, waiver and irreparable injury that require district court findings.

(App. G, p. 11); *see also* App. G, p. 6 ("We urge this Court to reverse and remand rather than proceed to decide all the issues the lower court has not yet considered.").

Brown & Williamson also emphasized that, should the Court of Appeals refuse to remand, but instead exercise its authority to determine the merits of the preliminary injunction motion, that step would still require reinstatement of the complaint

(App. G, pp. 10-11 & n*). In sum, Brown & Williamson believed that the most the appellate court could legitimately do was to affirm the District Court's denial of preliminary relief on grounds not considered by Judge Ballantine.

At no time did Brown & Williamson consider the possibility that the Court of Appeals might proceed to resolve the entire case without opportunity for discovery and trial. Indeed, Brown & Williamson always believed that the Sixth Circuit was, at most, considering only whether to decide the preliminary injunction motion, rather than remand to the District Court for determination of that motion.

Review by this Court is necessary to correct the Sixth Circuit's errors which led the panel to exceed the proper bounds of review.

CONCLUSION

For the foregoing reasons, we ask the Court to grant certiorari, and, upon that grant, to vacate the judgment on the merits entered by the Court of Appeals.

Dated: New York, New York
December 16, 1983

Respectfully submitted,

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APPENDICES

Appendix A

Listing pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States

Brown & Williamson Tobacco Corporation Affiliates*

	% equity shares held
United Kingdom	
+ British-American Tobacco Co Ltd	100
Ardath Tobacco Co Ltd	100
BAT (UK and Export) Ltd	100
BAT Services Ltd	100
Cia Continental de Cigarros Ltd	100
East African Tobacco Co (UK Ltd)	99
Moorgate Tobacco Co Ltd	100
The Raleigh Investment Co Ltd (incorporated in the Isle of Man)	96
+ BAT Stores Holdings Ltd	100
BAT Stores PLC	91
Argos Distributors Ltd	100(91)
International Stores Ltd	100(91)
Mainstop Ltd	100(91)
+ British-American Tobacco Investment p.l.c.	100
The Wiggins Teape Group Ltd	100
Jointine Products Co Ltd	100
Samuel Jones & Co Ltd	100
Wiggins Teape (UK) PLC	100
Wiggins Teape Europe Ltd	100

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* Each of the companies listed in this appendix is a subsidiary of B.A.T Industries, the parent company of Brown & Williamson Tobacco Corporation. Subsidiaries held directly by B.A.T Industries are indicated thus +; all other subsidiaries are held by sub-holding companies and B.A.T Industries' interest is shown in brackets where this differs from that of the sub-holding company.

	% equity shares held
Wiggins Teape European Sales Ltd	100
Wiggins Teape (Mill Sales) Ltd	100
Wiggins Teape Overseas Ltd	100
Wiggins Teape Overseas Sales Ltd	100
Wiggins Teape Paper Ltd	100
Wiggins Teape Research & Development Ltd	100
Wiggins Teape (Stationery) Ltd	100
+ Mardon Packaging International Ltd	100
Ashton Containers (Southern) Ltd	100
Ashton Containers (Midlands) Ltd	100
Ashton Containers (Scotland) Ltd	100
Ashton Paper Mill Ltd	100
Celloglas Ltd	100
Cundell Cartons Ltd	100
Cundell Corrugated Ltd	100
Cundell Plastics Ltd	100
Cundell Sheet Plants Ltd	100
Fibrenyle Ltd	100
Forman Marshall Ltd	100
Iridon Ltd	100
Lloyds Cartons Ltd	100
Mardon Composites Ltd	100
Mardon Flexible Packaging Ltd	100
Mardon Illingworth Ltd	100
Mardon Son & Hall Ltd	100
Mardon Wrappings Ltd	100
Severnside Waste Paper Ltd	100
Smith Brothers (Whitehaven) Ltd	100
The Pazo Co Ltd	100
Thomas Forman & Sons Ltd	100
William Thyne Ltd	100
+ BAT International Finance p.l.c.	100
+ Tobacco Insurance Co Ltd	100
+ British-American Cosmetics Ltd	100
Cyclax Ltd	100
Germaine Monteil (UK) Ltd	100

	% equity shares held
Lentheric-Morny Ltd	100
Yardley and Company Ltd	100
Europe	
Austria	
Durmont Teppichbodenfabrik Hartberg GmbH & Co KG	100(64)
Belgium	
BAT Benelux-Ets Odon Warland SA	100
Velasques Sigarenfabrieken NV	100
Haseldonckx SA	100
Wiggins Teape (Belgium) SA	100
Channel Islands	
The Jersey Tobacco Distributors Ltd	100
Cyprus	
BAT (Cyprus) Ltd	89
Finland	
Suomen Tupakka OY	100
Aarne Laaksonen Oy	72
France	
Papeteries de Montevrain SA	100
Societe Roannaise des Papiers SA	82
Ferry Peter SA	86
Giraudet Emballages SA	100
Imprimeries Debar SA	99
Compagnie Francaise de Fabrication et de Distribution SA	100
Germany	
BAT Cagaretten-Fabriken GmbH	100
BAT (Deutschland) Export GmbH	100
Ernst Hammans GmbH	98
Rotopack GmbH	100

	% equity shares held
Huppe GmbH	99
Klingenberg Dekoramik GmbH	100(64)
Peguform-Werke GmbH	100(64)
Pegulan-Werke AG	64
Schock Bad GmbH	100(99)
Wehra Teppiche und Mobelstoffe GmbH	100(64)
Germaine Monteil Cosmetiques GmbH	100
Juvena Produits de Beaute GmbH	100
Jacques Weindepot Wein Einzelhandel GmbH	100
Weinkruger, Weinhandels-und Gaststatten GmbH	100
Interversa Gesellschaft fur Beteiligungen mbH	100
Italy	
Ci-Esse SpA	100
Wiggins Teape Italiana SpA	100
Gruppo Ceramiche Ricchetti S.p.A.	60(38)
Netherlands	
BAT Nederland BV	100
Henri Wintermans' Sigarenfabrieken BV	100
BAT Finance BV	100
Republic of Ireland	
Superior Packaging Ltd	100
Wiggins Teape (Ireland) Holdings ltd	100
Switzerland	
BAT (Suisse) SA	99
Juvena Produits de Beaute AG	100
North America	
Canada	
+ Imasco Limited	100
Lawson & Jones Ltd	75

	% equity shares held
Lawson Business Forms (Manitoba) Ltd	100(75)
Lawson Graphics Pacific Ltd	100(75)
RBT Printing Ltd	100(75)
United States	
Arnold Cellophane Corporation	100
Boyertown Packaging Corporation	100
Lawson & Jones (Nevada)	100(75)
Mardon Packaging Corporation	100
Michigan Lithographing Company	100(75)
NER Data Products Inc	100
Pan American Industries Inc	100
Gimbel-Saks Retailing Corporation	100
The Kohl Corporation	100
Marshall Field & Company	100
Appleton Papers Inc	100
+ BAT Capital Corporation	100
BATUS Inc	100
BATUS-Wisconsin, Inc.	100
Brown & Williamson Industries Inc.	100
Germaine Monteil Cosmetiques Corporation	100
Tuvache, Inc.	100
Latin America & Caribbean	
Argentina	
Nobleza-Piccardo SAICyF	70
SA Alejandro Bianci & Cia Ltda	100(70)
Brazil	
Cia Industrial de Papel Pirahy	100
Cia Souza Cruz Industria e Comercio	75
Contab-Continental, Participacoes, Administracao de Bens e Planejamento SA	100
Suvalan-Cia de Produtos de Frutas	88(66)
Chile	
Cia Chilena de Tabacos SA	50
Litografia Moderna SA	100(50)

	% equity shares held
Colombia	
Yardley of London Colombiana SA	69
Costa Rica	
Republic Tobacco Co	80
El Salvador	
Cigarreria Morazan SA de CV	75
Honduras	
Tabacalera Hondurena SA	80
Nicaragua	
Tabacalera Nicaraguense SA	60
Panama	
Tabacalera Istmena SA	100
Suriname	
Tobacco Company of Suriname NV	100
Venezuela	
CA Cigarrera Bigott Sucs	100
Yardley of London Venezolana CA	100
Barbados	
British-American Tobacco Co (Barbados) Ltd	100
Guyana	
Demerara Tobacco Co Ltd	70
Trinidad & Tobago	
The West Indian Tobacco Co Ltd	64
Asia	
Bangladesh	
Bangladesh Tobacco Co Ltd	65(63)

	% equity shares held
Hong Kong	
British-American Tobacco Co (Hong Kong) Ltd	100
Wiggins Teape Ltd (Hong Kong)	100
India	
Tribeni Tissues Ltd	51
Indonesia	
PT BAT Indonesia	70
Japan	
Wiggins Teape (Japan) Ltd	100
Malaysia	
Malaysian Tobacco Co Berhad	64
Wiggins Teape (Malaya) Sdn Berhad	100
Yardley of London (Malaysia) SB	100
Pakistan	
Pakistan Tobacco Co Ltd	63
Singapore	
British-American Tobacco Co (Singapore) Ltd	80
Yardley of London (Singapore) Private Ltd	100
Wiggins Teape (Singapore) Private Ltd	100
Sri Lanka	
Ceylon Tobacco Co Ltd	84
Africa	
Kenya	
BAT Kenya Ltd	60(59)
Liberia	
The Monrovia Tobacco Corporation	51

	% equity shares held
Malawi	
BAT (Malawi) Ltd	75
Mauritius	
British-American Tobacco (Mauritius) p.l.c. (incorporated in the UK)	100
Nigeria	
Nigerian Tobacco Co Ltd	59
Sierra Leone	
Aureol Tobacco Co Ltd	86
South Africa	
Utico Holdings Ltd	63
Wiggins Teape (Pty) Ltd	100
Willards Foods (Pty) Ltd	100(63)
Yardley of London (Africa) (Pty) Ltd	100
Zaire	
BAT Zaire SARL	100
Zambia	
Wiggins Teape (Zambia) Ltd	100
Zimbabwe	
BAT Central Africa Ltd	85
Export Leaf Tobacco Co of Africa (Pvt) Ltd	100
Mardon Printers (Pvt) Ltd	52
Typocrafters (Pvt) Ltd	52
Australia	
+ Amatil Limited	100
British-American Cosmetics (Australia) Pty Ltd	100

	% equity shares held
Juvena Cosmetics Pty Ltd	100
Lentheric Morny Cyclax Australia Pty Ltd	100
New Zealand	
W D & H O Wills (New Zealand) Ltd	100(86)
Wiggins Teape New Zealand Ltd	100

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5594

Decided and Filed June 24, 1983

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff-Appellant,

—v.—

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

ON APPEAL from the United States District Court
for the Western District of Kentucky.

Before:

KEITH and MERRITT, *Circuit Judges*;
BROWN, *Senior Circuit Judge*.

MERRITT, *Circuit Judge*. The appellant, Brown & Williamson Tobacco Company (B&W), appeals the decision of the District Court for the Western District of Kentucky dismissing its suit against the Federal Trade Commission (FTC). Brown & Williamson challenges the following proposed actions and

statements of the FTC which the agency planned to publish in the Federal Register:

(1) the FTC has concluded that its present testing methodology does not accurately assess the "tar" and nicotine yields of B & W's Barclay cigarettes;

(2) the FTC's December, 1981 Report, which stated that the "tar" yield of Barclay cigarettes is 1 mg., is inaccurate and should be corrected;

(3) pending a revision in the test methodology, future FTC reports, if any, will not include results for Barclay cigarettes; and

(4) the FTC has concluded that "there is a significant likelihood" that the FTC method of testing does not assess accurately the "tar" and nicotine yields of B & W's Kool Ultra and Kool Ultra 100's which use the same filter design as the Barclay cigarette.

This June 25, 1982 announcement concluded a year long study by the FTC into the "tar" and nicotine content of Barclay cigarettes.

I. Background

The FTC has a long history of involvement in the testing and reporting of the "tar" and nicotine content of cigarettes. In 1967, the FTC established its own testing laboratory; the agency has made periodic reports to the public since that time. In 1971, while the FTC was in the process of promulgating a rule requiring the cigarette companies to include "tar" and nicotine figures in their advertisements, the major companies voluntarily entered into an agreement among themselves to advertise the figures.

In June, 1981, the FTC received a complaint from the R. J. Reynolds Tobacco Company, a competitor of B & W, alleging that the testing system presently used by the FTC to measure the "tar" content of the Barclay cigarette is inaccurate. The FTC method was never intended to provide precise measurements of "tar" and nicotine delivery to each smoker because

consumers smoke cigarettes in different fashions. Instead, the tests were designed to provide consumers with figures by which to compare the many brands of cigarettes on the market.

Cigarette manufactures have traditionally lowered the "tar" content of cigarettes by allowing air to be mixed with the smoke to dilute the intensity of the smoke. Most low "tar" cigarettes have a filter surrounded by porous paper with one or more rows of small ventilating holes encircling the filter which allow air into the smoke channel. The Barclay cigarette, however, has four lengthwise channels to conduct the air from the ventilating holes directly into the mouth. The air does not mix with the smoke until both are in the smoker's mouth. The amount of air dilution in the Barclay cigarette may be reduced if the smoker crushes or blocks channels with his lips.

Citing its own studies, R. J. Reynolds argued to the FTC that the unique filter on the Barclay cigarette was being enclosed by smokers' lips so that the claimed reductions in "tar" and nicotine were not occurring with Barclay. R. J. Reynolds claimed that the testing machine does not collapse the filter as does a human smoker and that the machine indicates a much lower "tar" content when testing Barclay than is typically delivered by Barclay to consumers.

After receiving the R. J. Reynolds letter, the FTC solicited comments from the five major cigarette companies including Brown & Williamson. The FTC also retained three independent experts who reviewed the extensive studies submitted by the cigarette companies. After a year of study, the FTC determined that the Barclay cigarette was indeed incorrectly measured by the testing machine. To prevent further dissemination to the public of what the FTC believed to be misleading information, the agency in a press release made the announcement described above which it proposed to publish in the Federal Register.

On that same day, June 25, 1982, Brown & Williamson filed suit in District Court to prevent the FTC from taking the actions described in the proposed Federal Register notice. Circuit Judge Boyce F. Martin, sitting as District Judge by

designation, issued a temporary restraining order so as to preserve the status quo pending a comprehensive review of the issues. The TRO prevented the FTC from:

(1) prohibiting B & W from relying upon the FTC's present cigarette testing methodology and upon the figures for Barclay reported in the December, 1981 FTC Report to substantiate B & W's advertising claim that Barclay is a 1 mg. "tar," 0.2 mg. nicotine cigarette;

(2) amending the December, 1981 FTC Report as to the "tar" and nicotine content of Barclay;

(3) refusing to continue to test Barclay cigarettes with the FTC's present methodology or to publish the results of these tests in future FTC Reports;

(4) publishing in the Federal Register any notice of changes or proposals to alter the FTC's present cigarette testing or reporting program.

District Judge Ballantine continued the temporary restraining order on July 27, 1982 and further ordered that the administrative record and other documents filed by the FTC be placed under seal. On September 27, 1982 the District Court dissolved the temporary restraining order and denied Brown & Williamson's motion for injunctive relief after concluding that the court lacked jurisdiction to hear the case. The District Court ruled that the FTC had not taken final agency action that was reviewable in federal court at that time.

Judge Ballantine did, however, issue a stay identical to the temporary restraining order pending appeal to this Court in order to prevent immediate and irreparable injury to Brown & Williamson. The FTC challenged the stay before a motions panel of this Court, but the motion was denied. After oral argument on March 22, 1983, this Court ordered that the stay be lifted, with the exception of the District Court's seal on all documents. We held that the appellant had failed to show that it was likely to succeed on the merits, one of the four requirements for a stay pending appeal.

Brown & Williamson maintains in this appeal that the District Court had jurisdiction to decide this case because the actions to be announced in the Federal Register notice constituted final agency action. On the substantive issues, appellant claims first, that the FTC did not follow the procedures mandated by the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, governing the promulgation of a rule by an agency. Specifically, B & W alleges that the FTC failed to comply with the notice and comment requirements of 5 U.S.C. §§ 553(b) and (c). Second, Brown & Williamson argues that the actions of the FTC were arbitrary, capricious and an abuse of agency discretion. The appellant urges this Court to remand the case for review on the merits by the District Court and to reinstate the stay pending the lower court's ruling on the motion for an injunction.

The FTC argues that the District Court's dismissal of the case was appropriate because its attempt to publish the announcement did not constitute agency action but was merely a statement of future policy. Even if the announcement should fall within the APA's definition of agency action in 5 U.S.C. § 551(13), the FTC maintains that it was not *final* agency action under 5 U.S.C. § 704 and, therefore, not subject to judicial review. The FTC points to the lack of any enforcement proceeding pending or threatened. The agency stresses that pre-enforcement judicial intervention is warranted only upon a showing that the aggrieved party must incur unduly burdensome business expenses to comply or face grave risks of criminal and civil sanctions for non-compliance.

The Public Citizen Health Research Group, a non-profit consumer organization which engages in research, education and advocacy on a range of health and safety issues, has filed a brief in this case as amicus curiae. Their primary objective is to have this Court lift or substantially modify the seal placed by the District Court on the administrative record and all other documents filed by the FTC. They maintain that the public has a right of access to these papers under the Freedom of Information Act, the First Amendment, and the common law.

For the reasons discussed below, we hold that the District Court erred when it dismissed this action for lack of jurisdiction. The steps taken by the FTC on June 25, 1982 were final agency action subject to judicial review to prevent substantial hardship to Brown & Williamson. We also hold, reaching the merits, that Brown & Williamson's claims under the APA are lacking in substance and are unsupported by the record. Finally, we reverse the District Court's order placing the documents in the case under seal and hold that under applicable legal principles they should be released for public inspection as are other court records and documents.

II. Final Agency Action

Judicial review under the Administrative Procedure Act may be sought only by a "person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute. . . ." 5 U.S.C. § 702. Agency action is defined in 5 U.S.C. § 551(13) as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . ." The FTC denies that it issued an order or promulgated a rule. The agency seeks to portray its June 25, 1982 announcement as the sole action taken. It analogizes the proposed publication to an announcement of an investigation or an enforcement policy, or the issuance of a complaint—which are generally not reviewable in court.

The FTC fails to acknowledge, however, that the announcement was only a small part of the action taken on June 25, 1982. The agency did notify the public of the Barclay investigation and of its doubts as to the accuracy of the Barclay "ultra-low tar" advertising claim. This alone might not have been subject to immediate review in court. But the FTC also halted the testing of Barclay cigarettes, stated that it would refuse to publish any "tar" or nicotine content figures for Barclay, and amended the 1981 Report which lists Barclay as a 1 mg. "tar" cigarette. As a result, it would now appear to be inappropriate for Brown & Williamson to continue to cite the

figures in the 1981 Report in its Barclay advertisements.[1] Although the FTC did not order Brown & Williamson to desist from making the "ultra-low tar" claim in its advertisements for Barclay, that is the effect of the action taken on June 25, 1982. The FTC may not have labelled its action on that date an order or a rule, but we find, nevertheless, that such dispositive decision-making falls within the definition of agency action.

The more difficult question is whether this agency action was final and otherwise ripe for judicial review. Ruling on this issue, the District Court concluded that:

> [The] FTC's proposed publication in the Federal Register is not a definitive ruling or regulation. It has no legal force or practical effect on plaintiff's daily business other than the disruptions that accompany any major litigation. Immediate judicial review would serve neither efficiency nor enforcement of the Act. These pragmatic considerations counsel against the conclusion that the proposed publication is final agency action.

We reverse the District Court because we believe the court failed to apply the principles of judicial intervention enunciated by the Supreme Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and its two companion cases, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967) and *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967).

In *Abbott*, the Supreme Court was asked to review a regulation promulgated by the Food and Drug Administration even though the agency had not initiated an enforcement action. The Food, Drug and Cosmetic Act required that the generic name of a prescription drug be printed prominently on the drug's label. Interpreting the provision, the agency issued a regulation requiring that the generic name appear every time

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1 In a letter to Brown & Williamson dated July 15, 1982, FTC Chairman Miller discussed the options left to B & W concerning its advertisements of Barclay. These did not include advertising Barclay as a 1 mg. "tar" cigarette with a citation to the 1981 Report as B & W currently advertises. App. at 473.

the brand name was printed on the package. The government took the position, and the Third Circuit agreed, that the drug companies would have to wait to test the validity of the regulation until the agency initiated an enforcement proceeding for mislabelling, denied a license for a new drug, or brought a criminal proceeding against a manufacturer. *Abbot Laboratories* v. *Celebrezze*, 352 F.2d 286 (3d Cir. 1965).

The Supreme Court reversed the Third Circuit in an opinion which remains the leading authority on pre-enforcement judicial review. The Court set out the following two-step test: (1) is the issue fit for judicial determination; and (2) how great is the hardship to the parties of refusing jurisdiction at this time. The fitness question was resolved in *Abbott* in favor of review because the Court characterized the case as involving a purely legal question with further factual development unnecessary. Analyzing the hardship prong of the test, the Court emphasized that:

> These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. . . . If petitioners wish to comply they must change all their labels, advertisements and promotional material. . . . The alternative to compliance—continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner—may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of 'misbranded' drugs.

Id. at 152-53. In addition to the hardship factor, the Court noted that review at that time would speed the process of compliance if the regulation proved valid. Pre-enforcement review, in other words, was not calculated by the drug companies to stall or frustrate the operation of the regulation.

The Court applied the *Abbott* two-prong test in *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967), again allowing pre-enforcement review of a controversial FDA regulation. The Food, Drug and Cosmetic Act required the Commissioner of the FDA to approve all color additives in food, drugs and cosmetics. At issue was the Commissioner's determination that the statute applied to diluents, additives used as diluting agents. Referring to the first part of the *Abbott* test, the Court determined that the question was essentially a legal one which would not necessarily be made clearer if raised in the context of a specific attempt to enforce the challenged regulation. The Court again emphasized that without immediate review, the companies were faced with an unreasonable choice. They could challenge the regulation through noncompliance, risking criminal seizure or injunctive suits filed by the government, or comply, which would entail substantial business expenses.

In the final companion case, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967), the Supreme Court denied jurisdiction for lack of ripeness. The FDA regulation under scrutiny provided that the Commissioner could suspend certification to any manufacturer who refused to allow FDA employees access for inspections. The Court acknowledged that the regulations constituted final agency action and that the case raised a purely legal issue. Nevertheless, the Court denied review primarily because the drug manufacturers could not show that direct and immediate harm would come if they failed to comply and then challenged the regulation in an enforcement proceeding. The Court also found that it could not resolve the issue adequately without a more fully developed factual record containing information as to how and why the Commissioner was utilizing the regulation requiring access.

The *Abbott* two-part test remains the key to determining whether to permit pre-enforcement review of agency action. *See* 4 K. Davis, *Administrative Law Treatise* 405 (2d ed. 1983); Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971).

The issues raised by Brown & Williamson in the court below are fit for judicial review. The company challenges the FTC action as violating the APA's rule-making process—a question of law which, under the record before us, requires no further fact-finding. Brown & Wiilliamson's second contention, that the FTC acted arbitrarily and capriciously, is a mixed question of fact and law. However, the appellant urged below that this issue be resolved upon the facts submitted to the District Court.[2] The FTC argues that the process of determining what Brown & Williamson may now advertise is ongoing. The agency argues that, as in the second *Toilet Goods* case, the issues would be framed better in an enforcement proceeding if and when the FTC sues Brown & Williamson for illegal advertising practices. While we agree that any controversy over future advertising campaigns is best left to an enforcement proceeding, the issues before us now involve only those decisions made by the FTC on June 25, 1982. The determination that the Barclay cigarette was incorrectly tested is well documented in the studies and discussions which are before this Court. Further fact-finding on the basis for the FTC's actions would not clarify at this time whether the FTC acted inappropriately in the summer of 1982.

The second prong of the test, the hardship factor, clearly counsels in favor of pre-enforcement review. The resemblence between the *Abbott* facts and those before us is striking. In both situations, the parties challenging the agency action were faced with significant changes in business operations to comply with the agency's determinations. The impact of the agency action in both cases was "direct and immediate." *Abbott, supra*, 387 U.S. at 152. As Brown & Williamson stresses, the key to the successful marketing of the Barclay cigarette has been its portrayal as a less carcinogenic product with the taste

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2 Brown & Williamson states in their main brief that their arguments on the merits also "present legal issues that will never be made more concrete or fit for judicial consideration by further agency proceedings. . . . To resolve Brown & Williamson's substantive challenge, the district court need only apply the law to the facts already before it." Appellant's Brief at 29.

and flavor of a more robust cigarette. By eliminating Barclay from the testing and reporting program, the FTC has not merely issued a statement of intent to investigate; if allowed to stand, the FTC's actions will force changes in the marketing strategies of Brown & Williamson. The hardship to Brown & Williamson of requiring the company to wait to resolve the issues until an enforcement proceeding appears to us to be no less than the hardship faced by the drug companies in *Abbott*.

The FTC argues that we should look to the hardship standard which the Supreme Court relied upon in *Gardner* v. *Toilet Goods Ass'n, supra,* to deny pre-enforcement review. In that case, however, the drug companies were only required to permit access to FDA investigators. Compliance did not entail the expenditures or marketing alterations which will befall B & W if it wishes to avoid an enforcement proceeding.

In addition to the hardship to Brown & Williamson, we must consider the impact on the FTC and the public of permitting pre-enforcement judicial intervention. The FTC resists judicial review because the agency would like to proceed informally with Brown & Williamson to negotiate a permissible advertising strategy. We believe, however, that these negotiations could only be enhanced by the resolution of this case so that both parties may know the legal effect of the FTC's decisions of June 25, 1982.

In addition, there are clear advantages to the general public of judicial review at this time. The FTC's involvement in cigarette testing and reporting is designed to reduce the health risks of smoking by disseminating current, valid statistics on the content of the many cigarette brands. Declining jurisdiction would only delay the dissemination of the most up-to-date information on Barclay cigarettes. The reliance that smokers who are concerned about health risks place on representations of the "tar" and nicotine content of cigarettes underscores the public interest in resolving this controversy in this forum.

III. The Merits

A. Procedural Adequacy

The District Court never ruled on Brown & Williamson's two arguments on the merits because the court below erroneously held that it lacked jurisdiction. Rather than remand the case which would entail further delay, we have decided in the interest of judicial economy to reach the merits of this case.[3] After careful review of the entire record, we find that the appellants have failed to present supportable arguments for further disrupting the FTC's proposed program concerning the testing and reporting of Barclay cigarettes.

Brown & Williamson first contends that the actions of the FTC constituted rule-making and, therefore, must be invalid because the FTC failed to follow the APA's rule-making procedures as provided in § 553:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms of substance of the proposed rule or a description of the subjects and issues involved.

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3 *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3937 (1977); *United States* v. *Criden*, 681 F.2d 919, 922 (3d Cir. 1982). We note that Brown & Williamson acknowledges in its brief that:

> Both parties submitted the case below on the law. Neither side argued to the District Court that further fact-finding was necessary to decide the issues presented.

Appellant's Brief at 27.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . .

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. § 553.

The parties spend a great deal of time debating whether the actions taken by the FTC on June 25, 1982 fall within the exceptions in the statute for general statements of policy. We do not need to resolve that issue because we find that the appellant had actual notice and an adequate opportunity to comment on the proposed changes.

The statute makes an exception to the requirement that a notice of proposed rule-making be published in the Federal Register if the persons subject to the rule have actual notice.

The documents submitted to the District Court leave no room for doubt that Brown & Williamson was repeatedly notified both of the FTC's questions concerning the accuracy of the Barclay 1 mg. "tar" claim and of the agency's contemplation of a change in testing methodology. Congress enacted Section 553 to insure that any rules or regulations promulgated by federal agencies which affect the day-to-day activities of businesses and individuals be conceived in an atmosphere immune from prejudice. But when the purposes of the procedural requirements have been fully met, there is no need for the courts to require rigid adherence to formalistic rules. *See Duke City Lumber Co.* v. *Butz,* 382 F.Supp. 362, 372 (D.D.C. 1974).

Reviewing the record, it is difficult to comprehend how Brown & Williamson can contend that they received no actual notice of the FTC's intended course of action. On June 11, 1981—over a year before the proposed Federal Register notice—the FTC sent a letter to Brown & Williamson advising the company that the agency had received a complaint from R.J. Reynolds and was studying the possibility of adopting a new testing methodology in order to measure Barclay cigarettes more accurately. The letter stated:

> The purpose of this letter is to begin a dialogue between the Commission staff and the members of the cigarette manufacturing industry on the merits of the R.J. Reynolds proposal and to provide all members of the industry with an opportunity to comment informally on the proposal at the earliest possible stage.

App. at A26. On October 9, 1981, the FTC sent a follow-up letter apprising Brown & Williamson of the status of the investigation. Although each company had submitted studies during the summer months, the letter stated that it was the staff opinion that additional information was needed. On December 15, 1981, the FTC published in the Federal Register one of its periodic reports on the "tar" and nicotine content of most brands of cigarettes. The report identified Barclay as a 1 mg. "tar" cigarette but it also included three paragraphs

describing in detail the R.J. Reynolds complaint that Barclay was incorrectly measured by the FTC smoking machine.[4] FTC Report of "Tar," Nicotine and Carbon Monoxide of the Smoke of 200 Varieties of Cigarettes, 46 Fed. Reg. 61828, Dec. 15, 1981.

By February 1982, the FTC had sent all of the material submitted by the cigarette companies to the three independent experts, Drs. Bock, Guerin and Kozlowski. Each expert concluded that the FTC smoking machine does not measure the Barclay cigarette accurately, and recommended that the testing methodology be changed. App. at A161, A-235 and A243. Copies of all of these reports were sent to Brown & Williamson on March 17, 1982. Although there may be some dispute as to the number and dates, it is clear from a Brown & Williamson letter dated June 11, 1982 that the company had several opportunities to talk with the Commissioners about the proposed changes shortly prior to the FTC's June 25, 1982 actions. *See* App. at A348.

From these numerous contacts and written communications, well-documented in the record, it is abundantly clear to us that Brown & Williamson had actual notice of the FTC's actions—whether or not such notice was required by the Administrative Procedure Act.

In addition to notice, § 553 requires that interested persons be given an opportunity to comment and otherwise participate in the rule-making procedure. 5 U.S.C. § 553(c). Brown & Williamson contends that it "had no advance opportunity whatever to comment on the action taken on June 25th." Appellant's Reply Brief at 16. The appellant tries to distinguish between the opportunities it had to comment on the "wide-

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4 The report concluded:

> Thus, it is contended that the Commission's current testing methodology does not accurately measure the relative level of "tar" delivered by Barclay to smokers when compared with other 1 mg. "tar" cigarettes. The Commission is currently investigating these allegations, and has not made a final determination on the merits of this Complaint.

App. at A77.

ranging inquiry conducted before-hand" and the opportunity to comment on the June 25, 1982 actions of the FTC. We reject this distinction. The record contains multiple invitations for comments from the FTC to Brown & Williamson and the other cigarette companies covering every aspect of the investigation and encompassing the actions taken on June 25, 1982.

As discussed above, Brown & Williamson was fully aware of the proposals to change the testing methodology and to remove Barclay from the testing and reporting process. The studies submitted by B & W throughout the year of agency review addressed in detail the FTC's proposed actions of June 25, 1982. Following the FTC's June 11, 1981 letter apprising B & W of the R.J. Reynolds complaint, Brown & Williamson representatives met with the FTC staff to present their view that Barclay was correctly labelled a 1 mg. "tar" cigarette. Counsel for Brown & Williamson sent an 18 page letter to the FTC on July 16, 1981 describing the meeting and documenting B & W's position against revising the "tar" figures for Barclay or the testing methodology. On June 20, 1981, the agency sent each company the submissions of their competitors and encouraged the companies to comment on or criticize the conclusions contained in the reports. On October 23, 1981, after several extensions from the FTC, Brown & Williamson filed an extensive report totaling 185 pages, including three studies by the company's own experts. Brown & Williamson was then given an opportunity to answer specific questions posed by the three independent consultants. Following the dissemination of the reports filed by the three experts, Brown & Williamson was invited to comment on the statements and conclusions contained in the reports. Finally, representatives from and counsel for B & W had the opportunity to discuss the company's position orally before the Commissioners prior to June 25, 1982.

The reports, studies and discussions in which Brown & Williamson participated focused precisely on whether the FTC should take action regarding the advertising of the Barclay cigarette. The FTC repeatedly allowed and encouraged Brown

& Williamson to defend the accuracy of the present testing methodology. Brown & Williamson knew from the proposals included in the R.J. Reynolds complaint that the FTC was considering revising the "tar" statistics of Barclay. We can see no benefit in requiring the FTC to follow further comment procedures. As the Court of Appeals for the D.C. Circuit wrote in a similar case:

> If the purpose of notice when requiring in any case is to *give notice,* the appellants-petitioners here had it. There is no showing that they were deprived of the opportunity in any measure to take whatever steps their own situation might suggest, whether by way of counter-proposal and comment or by evidence to establish their own position. That they are not happy over the result is clear. That they sustained legal injury is not.

Owensboro On the Air v. *United States,* 262 F.2d 702 (D.C. Cir. 1958).

B. Agency Abuse of Discretion

In addition to its procedural challenges, Brown & Williamson maintains that the FTC's actions were arbitrary, capricious and an abuse of discretion in violation of 5 U.S.C. § 706. Although B & W separates this argument into four claims—insufficient evidence, arbitrariness, discrimination, and vagueness—the company essentially objects to the Barclay brand being singled out by the FTC. B & W asserts that there was no evidence before the FTC to support any different treatment than that given other cigarettes with filters that can be crushed in the mouth of the consumer.

The record, however, contains studies and opinions by the independent experts and the other cigarette companies which show just such a difference in filter effectiveness between Barclay and the other ultra-low "tar" brands.[5] Dr. Lynn

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5 Dr. Kozlowski, one of the independent experts, even points to the Gori-Darby study conducted by B & W as being supportive of the conclusion that Barclay was more inaccurately measured. App. at A57.

Kozlowski unequivocally stated that "Barclay presents greater risks of high tar and nicotine yields to smokers than do other ultra-low-tar brands." App. at A57. The expert concluded:

> To summarize, I think that Barclay is not properly assayed to smokers out of proportion to its ranking on the FTC lists. It should be noted that all ventilated filter cigarettes . . . are subject to a similar violation of the integrity of the rankings, but that Barclay (as supported by the PM air-dilution studies, the Lorillard Uninhaled-Puff Study, and the above analysis of the Gori Studies) is significantly more prone to this violation than are conventional ventilated-filter cigarettes.

App. at A68. The second expert, Dr. Michael R. Guerin, also carefully analyzed the many studies submitted by the five companies and concluded that "[i]t is my carefully considered opinion that the contention of [R. J. Reynolds] and [Phillip Morris] is correct in that the current FTC method does not appropriately rank the delivery of cigarettes containing the Barclay-type filter." App. at A235. Finally, Dr. Fred G. Bock reached the same conclusions that the Barclay cigarette is inaccurately tested. He emphasized that "the ventilation studies indicate that smokers handle Barclay cigarettes differently than other 1 mg. cigarettes. . . . The preponderance of data thus indicate that the present FTC tar and nicotine yield values of Barclay cigarettes are misleading." App. at A258.

The FTC did not act arbitrarily. The conclusions of the three experts are consistent and clear. All three experts reviewed the extensive materials filed by the companies and weighed the persuasiveness of the methodologies utilized in the studies. Faced with such overwhelming evidence that Barclay was inaccurately being reported as a 1 mg. "tar" cigarette, the FTC appropriately took action to halt the dissemination of misleading and incorrect statistics to the public.

Nor did the FTC act in an immpermissibly discriminatory manner. The studies focused on the difference between the

Barclay type of filter and the filters prevalent in the marketplace. The experts all concluded that there were significant differences between the Barclay inaccuracies and the possible errors in testing other brands. The problems of testing Barclay arise from its unique filter construction. The FTC did single out Barclay in its actions of June 25, 1982, but the agency did so for legitimate and well-documented reasons. Agencies must be able to distinguish in their orders among products on the market which subject the public to varying degrees of risk. In this case, Brown & Williamson had every opportunity for over a year to show that Barclay delivers as little "tar" and nicotine to the consumer as do other ultra-low "tar" brands. They failed to do so.

IV. The Seal On Documents

The District Court's orders placed all documents filed by the FTC under seal and continued the seal pending this appeal. The Public Citizens Health Research Group has filed a comprehensive amicus brief opposing this action, and Brown & Williamson has ably defended it. Because of its importance, we reach the question on our own motion. Under the First Amendment and the common law, we conclude that the District Court erred by failing to state findings or conclusions which justify nondisclosure to the public. The order of the District Court sealing the documents in the case is, therefore, vacated.

According to Brown & Williamson's brief and the affidavit of Martin London, appellant's counsel, the parties agreed at the outset of the administrative proceedings that the record be sealed to protect the agency's confidentiality commitment to Brown & Williamson and the other four cigarette companies which submitted information to the FTC. After the FTC subsequently objected to the *in camera* treatment of all of the documents in the judicial proceeding, Judge Ballantine requested that the parties submit a list of the documents which they agreed should not be disclosed, with briefs discussing the

remainder. When the FTC failed to meet with counsel for Brown & Williamson or to file briefs on the issue, Judge Ballantine simply placed a seal on the entire record in the case.

The Citizens Group argues that the seal was improper on three grounds—the Freedom of Information Act, the First Amendment guarantees of freedom of speech and press, and the common law presumption of access to court documents. Brown & Williamson, on the other hand, argues that the FOIA has no relevance outside of the context of an administrative agency's decision whether to release documents to the public. Furthermore, the company asserts that the District Court has broad discretion to control access to documents submitted in cases on the court's docket. The company stresses that this discretion was not abused because the Court properly honored the agreement between the five tobacco companies and the FTC that all information furnished the agency during the year of investigation be kept confidential.

A. The Freedom of Information Act

We disagree with the Citizens Group that the FOIA operates as a limiting standard in this situation. Congress enacted the Freedom of Information Act in order to provide the public with access to records of federal agencies. *See, e.g.*, S. Rep. No. 813, 89th Cong., 1st Sess. 3-6 (1965). Included in the FOIA are a list of exceptions to the general requirement that agencies furnish upon request all documents within their possession. 5 U.S.C. § 552(b). The Freedom of Information Act specifically exempts the federal courts from its disclosure requirements. 5 U.S.C. § 551(1)(B). It is clear that the Act was not intended to restrict the federal courts—either by mandating disclosure or by requiring non-disclosure under the § 552 exemptions. *Crystal Grower's Corp.* v. *Dobbins*, 616 F.2d 458 (10th Cir. 1980). Thus, we reject the argument that the District Court below should have limited its seal to those documents not available to individuals under the exemptions to the FOIA.

B. Discretion of Trial Court

Although we reject the suggestion that the FOIA places limitations on the District Court's discretion to seal court documents, the First Amendment and the common law do limit judicial discretion. Brown & Williamson points out that courts on occasion have emphasized the discretion of the trial court in this area. In *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589 (1978), the Supreme Court stated that "every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* at 598. In *Krause* v. *Rhodes*, 671 F.2d 212 (6th Cir. 1982), this Court reiterated the Supreme Court's position that "the decision as to access is one best left to the second discretion of the trial court." *Id.* at 219. *See also*, *United States v. Criden*, 681 F.2d 919 (3rd Cir. 1982); Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 GEORGIA L. REV. 659, 666-72 (1982).

Having "supervisory power" or "discretion" to deny access to documents does not, however, imply that the District Court operates without standards. In this case, the District Court placed a seal on *all* of the documents filed by the FTC without discussion. The District Court's decision is not insulated from review merely because the judge has discretion in this domain. The District Court's discretion is circumscribed by a long-established legal tradition.

C. The Standards

The English common law, the American constitutional system, and the concept of the "consent of the governed" stress the "public" nature of legal principles and decisions.[6]

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6 Long ago Locke emphasized the need for "*promulgated* standing laws"—established, settled, *known* laws received and allowed by common consent"—without which "men would not quiet the freedom of the state of Nature." They would not "put a force into the magistrate's hands to execute

Throughout our history, the open courtroom has been a fundamental feature of the American judicial system. Basic principles have emerged to guide judicial discretion respecting public access to judicial proceedings. These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision.

In the leading case of *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), the Supreme Court elaborated on the historical and philosophical underpinnings of the right of access. There the trial court had closed the proceedings to the press and public on the motion of the defendant and without objection from the prosecution on the ground that jurors would improperly obtain information through the media. Reversing the trial court, the Supreme Court in *Richmond Newspapers* found that the public right of access applies to criminal trials primarily because of the long history of open courtrooms. In England the practice developed from an obligation to attend into a right of access to be enjoyed at will by memebers of the community. *Id.* at 565. The Supreme Court concluded:

> [T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensible attribute of an Anglo-American trial.

Id. at 569. *See also Globe Newspaper Co.* v. *Superior Court, etc.*, 102 S.Ct. 2613, 2619-20 (1982).

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his unlimited will arbitrarily upon them." Locke, *Treatise of Civil Government* §§ 124, 136-37 (1690). The development of the concept of public access to judicial proceedings in the seventeenth and eighteenth centuries arose in part as a reaction to secret proceedings in the Star Chamber and other prerogative courts. *See In Re Oliver*, 333 U.S. 257, 268-70 (1948).

The Supreme Court's historical argument is based on policy considerations developed in the past that remain valid today. First, public trials play an important role as outlets fot "community concern, hostility, and emotions." *Richmond Newspapers, supra*, at 571. When judicial decisions are known to be just and when the legal system is moving to vindicate societal wrongs, members of the community are less likely to act as self-appointed law enforcers or vigilantes. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.' " *Id.* at 571.

Second, public access provides a check on courts. Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court. The remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court. In his concurrence, Justice Brennan emphasized this link between access to the courtroom and the popular control necessary in our representative form of government. *Id.* at 592. Although the federal judiciary is not a majoritarian institution, public access provides an element of accountability. One of the ways we minimize judicial error and misconduct is through public scrutiny and discussion.

Finally, Justice Brennan points out that open trials promote "true and accurate fact finding." *Id.* at 596. *See also, Globe Newspaper Co.* v. *Superior Court, etc.*, 102 S.Ct. 2613, 2620 (1982). When information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence. *See In Re Oliver, supra.* Witnesses in an open trial may be less inclined to perjure themselves. Public access creates a critical audience and hence encourages truthful exposition of facts, an essential function of a trial.

The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial. The Supreme Court has acknowledged the broad application of

these principles. Justice Burger's plurality opinion notes that "whether the public has a right to attend trials in civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, supra*, at 580 n.17. Justice Stewart, concurring, states emphatically that "the First and Fourteenth Amendments clearly gives the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599. The historical support for access to criminal trials applies in equal measure to civil trials. *See Gannett Co.* v. *DePasquale*, 443 U.S. 368, 386 n.15 (1979) ("For many centuries, both civil and criminal trials have traditionally been open to the public.") *See also* Fenner & Koley, *Access to Judicial Proceedings: To* Richmond Newspapers *and Beyond*, 16 Harv. C.R.—C.L.L. Rev. 430-31 (1981); Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 156 n.42 (1980); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv. L. Rev. 1899, 1921-23 (1978).

The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.

The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.

Finally, the fact-finding considerations relied upon by Justice Brennan obviously apply to civil cases. Openness in the courtroom discourages perjury and may result in witnesses

coming forward with new information regardless of the type of the proceeding.

The right of access is not absolute, however, despite these justifications for the open courtroom. Courts have carved out several distinct but limited common law exceptions to the strong presumption in favor of openness. The exceptions to the practice of maintaining openness in the courtroom fall into two broad categories: those based on the need to keep order and dignity in the courtroom and those which center on the content of the information to be disclosed to the public. The first type of access restriction resembles the traditional time, place and manner restrictions on speech. In *Richmond Newspapers, supra,* the Supreme Court noted that "a trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial. . . . It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets." *Id.* at 581 n.18. Any such regulations must pass the following three-part test: that the regulation serve an important governmental interest; that this interest be unrelated to the content of the information to be disclosed in the proceeding; and that there be no less restrictive way to meet that goal. *See United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). These limitations on access, such as regulating the number of spectators or the use of flashbulbs or cameras, have been accepted in many instances as based on the legitimate societal interest in protecting the adjudicatory process from disruption. *See, e.g., Illinois* v. *Allen*, 397 U.S. 337, 343 (1970); *Sheppard* v. *Maxwell*, 384 U.S. 333, 354 (1966); Fenner & Koley, *Access to Judicial Proceedings, To* Richmond Newspapers *and Beyond*, 16 Harv. C. R.—C. L. L. Rev. 444-46 (1981).

It is the second group of limitations on access to court proceedings that concerns us here. Under the common law, content-based exceptions to the right of access have been developed to protect competing interests. In addition to the defendant's right to a fair trial, these interests include certain privacy rights of participants or third parties, trade secrets and

national security. *See Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 598 (1978); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv. L. Rev. 1899 (1978).

Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records. In *Joy* v. *North*, 692 F.2d 880 (2d Cir. 1982), for example, the special litigation committee of a bank sought to have their report placed under court seal. The report recommended to the corporation that a stockholder derivative suit be terminated. The committee argued in part that the report contained a candid review of internal business operations of the bank which, if made public, would adversely affect the bank and the local community. Lifting the District Court's seal, the Second Circuit said:

> [A] naked conclusory statement that publication of the Report will injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal. The Report is no longer a private document. It is part of a court record. Since it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny. The potential harm asserted by the corporate defendants is in disclosure of poor management in the past. This is hardly a trade secret.

Id. at 894. The Second Circuit was responding in the case above to the natural desire of parties to shield prejudicial information contained in judicial records from competitors and the public. This desire, however, cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know. In such cases, a court should not seal records unless public access would reveal

legitimate trade secrets, a recognized exception to the right of public access to judicial records.

Brown & Williamson seeks to justify the imposition of the court-ordered seal on the FTC documents in this case by pointing to the confidentiality agreement between the five cigarette companies and the FTC. There is no trade secret issue. All of the major competitors have had complete access to the documents.[7] The cigarette companies voluntarily submitted their reports to the FTC under the Federal Trade Commission Act, 15 U.S.C. § 57b-2(c) which provides for confidential treatment of certain information as follows:

> (c)(1) All information reported to . . . the Commission . . . shall be considered confidential when so marked by the person supplying the information and shall not be disclosed. . . .

Brown & Williamson maintains that the understanding between the agency and the companies entered into at the time when the documents were submitted and which is sanctioned by the FTC Act should override the presumption of public access. In other words, B & W seeks to have an exception created to maintain in a court proceeding the confidentiality promised during an agency investigation.

The Federal Trade Commission Act, however, specifically limits the confidentiality provisions so that they apply only to the agency:

> (2) Any disclosure of relevant and material information in . . . judicial proceedings to which the Commission is a party shall be governed by . . . court rules or orders. . . .

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7 At oral argument, counsel for Brown & Williamson responded as follows to a question from the Court as to whether there was a claim that the documents contained trade secrets:

> There is no such claim. The claim arises under the confidentiality agreement.

15 U.S.C. § 57b-2(d)(2). Thus, the court must apply the rules and principles governing the right of access to court documents as in any other civil case. The confidentiality agreement between the parties does not bind the court in any way.

We decline to carve out an exception to the right of access in order to protect the secrecy of an administrative record. The public has a strong interest in obtaining the information contained in the court record. The subject of this litigation potentially involves the health of citizens who have an interest in knowing the accurate "tar" and nicotine content of the various brands of cigarettes on the market. The public has an interest in knowing how the government agency has responded to allegations of error in the testing program. The public has an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions.

Accordingly, the orders of the District Court sealing documents in the case are vacated. The order of the District Court dismissing the case on jurisdictional grounds is reversed. Judgment will be entered for the defendant on the merits for the reasons stated.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

No. C 82-0373-L(B)
[Filed September 27, 1982]

BROWN & WILLIAMSON TOBACCO CORPORATION

Plaintiff

—v.—

FEDERAL TRADE COMMISSION

Defendant

MEMORANDUM

This matter is before the Court on the motion of the plaintiff for a preliminary injunction.

This action was filed June 25, 1982. On that date Circuit Judge Boyce F. Martin, Jr., sitting by designation, granted a temporary restraining order which restrained defendant, Federal Trade Commission (FTC), from:

> "1. Prohibiting Brown & Williamson from relying upon defendant's present cigarette testing methodology and upon the 'tar' and nicotine figures for Barclay reported in the FTC 'Tar' and Nicotine Report published by defendant in December, 1981 to substantiate Brown & Williamson's claim that Barclay is a 1 mg 'tar,' 0.2 mg nicotine cigarette.
>
> 2. Amending the FTC 'Tar' and Nicotine Report published by defendant in December, 1981 as to plaintiff's Barclay cigarette;

3. Refusing to test Barclay for 'tar' and nicotine by means of defendant's present testing methodology or to publish the results of such tests in future FTC 'Tar' and Nicotine Reports."

Thereafter, on July 23, 1982, the Court heard oral arguments on plaintiff's motion for preliminary injunction and the matter now stands submitted on that motion.

Without extending this memorandum to an unreasonable length, it may be noted that as the result of negotiations between the FTC and the tobacco industry, cigarette manufacturers, including plaintiff, agreed to display on their cigarette packages the "tar" and nicotine content expressed in milligrams. This voluntary agreement led the FTC to conclude that there was no longer a need to adopt a Trade Regulation Rule requiring publication of "tar" and nicotine content of cigarettes.

The "tar" and nicotine content were to be determined by the use of a device which measured the substances in the smoke. This is known as the Cambridge Filter method which, for brevity, we will hereafter refer to as the FTC method.

No one contends that the FTC method in any way approximates the smoking habits of human beings. The test is designed to determine the relative amounts of "tar" and nicotine in various brands of cigarettes.

Recent public pronouncements by various agencies and organizations concerning the effects of cigarette smoking and, particularly, of "tar" and nicotine on the human system, led the six major manufacturers of cigarettes to try to develop cigarettes that are as low in "tar" and nicotine as possible, yet which retain a degree of taste that makes them marketable.

The Court is well aware that the cigarette industry is fiercely competitive and, thus, a cigarette that is significantly lower in "tar" and nicotine would be attractive to those smokers who are concerned about the health questions.

In January, 1981, plaintiff began to market a new brand of cigarettes called "Barclay." Barclays were fitted with an innovative filter which produced significantly less "tar" and nico-

tine than its competing low "tar" and nicotine brands. Barclay, by the FTC method, produced 1 mg. "tar" and 0.2 mg. nicotine. An intensive advertising campaign by plaintiff led to Barclay's capturing a significant share of what is termed the ultra-low tar market. Barclay apparently gored the oxen of R. J. Reynolds and Phillip Morris, the two largest cigarette producers in America. They complained to the FTC asserting that the FTC method was an inaccurate device by which to measure the "tar" and nicotine content of Barclay cigarettes. R. J. Reynolds and Phillip Morris suggested that tests which they had conducted indicated a substantially higher measurement of "tar" content and they requested the FTC to adopt a new measurement of testing.

Plaintiff urged the staff of the FTC to enter into negotiations to attempt to resolve the dispute among its, plaintiff's, data, and data submitted by R. J. Reynolds and Phillip Morris and the data furnished the staff by consultants employed by the FTC. Nothing came from these urgings and the staff submitted to the FTC a report, the contents of which were withheld from plaintiff.

The FTC reached a determination that it would prohibit plaintiff from relying on the FTC mehtod when advertising Barclays. This lawsuit followed.

Plaintiff advances the appealing argument that the decision of FTC to prohibit plaintiff's advertising the "tar" and nicotine as measured by the FTC method places plaintiff between Scylla and Charybdis. If plaintiff advertises without disclosing the "tar" and nicotine content, or if it persists in advertising its "tar" and nicotine content by use of the FTC method, it runs the risk of facing an enforcement action charging unfair or deceptive practices. The only other avenue is the elimination of all Barclay advertising, an even less appealing prospect.

In determining whether to grant injunctive relief the Court must look to the four tests articulated in *Mason County Medical Association v. Knebel*, 563 F.2d 256 (6th Cir. 1977):

> "In determining on appeal whether the District Court abused its discretion in granting or withholding prelimi-

nary injunctive relief, this Court has set forth four standards which must be considered:

1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
2) Whether the plaintiffs have shown irreparable injury;
3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
4) Whether the public interest would be served by issuing a preliminary injunction."

563 F.2d at 261.

FTC proposed a Federal Register notice that would set forth its determination that the FTC method of measuring "tar" and nicotine was inaccurate so far as Barclay was concerned and therefore unacceptable. FTC further determined that a new test method was indicated based on the fact that independent consultants had concluded that Barclay's correct "tar" rating was from 3 mgs. to 7 mgs. FTC further proposed amending its December, 1981 report of comparative "tar" and nicotine ratings of various cigarettes by adding the Federal Register notice as an addendum, thereby effectually deleting Barclay's ratings. The proposed notice also took aim at two other brands manufactured by plaintiff which used the same filter as Barclay. The relevant portions of the notice concluded with a request for comments on three proposed modifications to the FTC method and for comments on the desirability of an even broader examination of the FTC method.[1]

It is the substance of this proposed publication that is the subject of the temporary restraining order.

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1 The Court's inquiry into this matter has been hampered by the fact that FTC apparently purchased six 3-ring, loose-leaf binders from the low bidder. Attempts to remove the binders from the box in which they were delivered to the Court invariably resulted in most of the documents falling in a disorderly heap in the bottom of the box.

The threshhold question before the Court is whether the restrained publication is "agency action" as that term is used in Title 5 U.S.C. Section 702. Engrafted onto that question is whether plaintiff will suffer a legal wrong or is adversely affected or aggrieved within the meaning of a relevant statute.

If the proposed publication is not final agency action, judicial consideration of plaintiff's claim is forbidden. *Dairymen, Inc. v. FTC*, 684 F.2d 376 (6th Cir. 1982). *See also, First National Monetary v. Commodity Futures Trading*, 677 F.2d 522 (6th Cir. 1982). In *FTC v. Standard Oil of California* (Socal), 449 U.S. 232, 101 S.Ct. 488 (1980), the Court, in considering the question of finality of agency action and prior judicial intervention observed:

> "Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. (Citation omitted.) Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. * * * * Finally, every respondent to a Commission complaint could make the claim that Socal had made. Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes." 449 U.S. at 242-243, 101 S.Ct. at 494.

Paraphrasing the *Socal* court, we conclude that FTC's proposed publication in the Federal Register is not a definitive ruling or regulation. It has no legal force or practical effect on plaintiff's daily business other than the disruptions that accompany any major litigation. Immediate judicial review would serve neither efficiency nor enforcement of the Act. These pragmatic considerations counsel against the conclusion that the proposed publication is final agency action.

In view of our conclusion we must determine that plaintiff cannot satisfy the first test of *Mason County Medical Association, supra*, and the Court's ultimate determination is that it is without jurisdiction to review the proposed action.

The foregoing discussion constitutes the Court's findings of fact and conclusions of law. F.R.Civ.P. 52(a).

The temporary restraining order will be dissolved, the motion for preliminary injunction will be denied, and this action will be dismissed.

An appropriate Order has been entered this 27th day of September, 1982.

THOMAS A. BALLANTINE, JR.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5594

[Filed September 19, 1983]

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff-Appellant,

—v.—

FEDERAL TRADE COMMISSION,

Defendant-Appellee,

PUBLIC CITIZEN HEALTH RESEARCH GROUP,

Amicus Curiae.

Before:

KEITH and MERRITT, *Circuit Judges*;
BROWN, *Senior Circuit Judge*.

ORDER DENYING PETITION FOR REHEARING *EN BANC*

Plaintiff-Appellant, Brown & Williamson Tobacco Corp., has filed an unusual petition for en banc review and for reconsideration of this Court's opinion and judgment. No judge of the Court has suggested en banc review, and the original three-judge panel holds to its view that the case was correctly decided and should not be reconsidered. Brown & Williamson's petition is therefore denied.

We address briefly a striking inconsistency between the arguments of counsel for Brown & Williamson in their en banc petition and their arguments in their original appellate briefs. Counsel for the Company now claims that the Court, after deciding the initial jurisdictional issue (the "final agency action" issue), lacked power to address the merits because the record is not complete and because further extensive discovery is necessary. This assertion is contrary to the position counsel took in their initial and reply briefs and in oral argument.

It is elementary that an appeal from the denial of injunctive relief brings the whole record before the appellate court and that the "scope of review may extend further [than the immediate question on which the District Court ruled] to allow disposition of all matters appropriately raised by the record, including entry of final judgment." 16 Wright & Miller *Federal Practice* § 3921 (1977). We have "jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the Court of Appeals without further trial court development." *Ibid.* This principle is supported by numerous precedents and by policy considerations. *See, e.g., Hurwitz v. Directors Guild of America, Inc.*, 364 F.2d 67, 69-70 (2d Cir. 1966), and the cases cited in Wright & Miller, *supra*, § 3129.

In their opening appellate brief, counsel for the company stated several times: "Both parties submitted the case below on the law. Neither side argued to the District Court that further factfinding was necessary to decide the issues presented." Brief of Appellant, p. 27. For similar statements, see Appellant's Brief, pp. 4, 28-29, 32-33.

Counsel for the FTC, in their brief, agreed with the position that the record was developed and that no further factfinding was necessary. Their brief stated that "If the Court determines that the Commission's action is reviewable now [as final agency action], there is a compelling need to resolve the dispute in this Court without remand." Brief of Appellee, pp. 28-29. The FTC then argued the merits of the case for the next 20 pages of its brief.

In their reply brief, counsel for the company say that "Should this Court decide to conduct the necessary in-depth review in the first instance" to decide the merits, Reply Brief, p. 18, the merits should be decided in the Company's favor. Counsel then spends twelve pages arguing the merits of the "rulemaking" and the "arbitrary and capricious" issues. Reply Brief, pp. 12-24. Not once in either its Opening or Reply Brief does the Company suggest that additional proof is necessary or that the record is incomplete or that this Court is without authority to decide the case on the merits.

It is not unusual in seeking review after losing for counsel to shift ground subtly, but we have not before witnessed such a complete turnabout. Counsel appear to have taken literally to heart Emerson's admonition in his *Essay on Self Reliance*:

> A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. . . . Speak what you think now in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict every thing you said today.

Ralph Waldo Emerson: Essays and Journals, 95 (Munford, ed. 1968). We do not think that the "great souls" Emerson had in mind include lawyers and judges in the process of deciding this kind of case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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* This order was prepared by Judge Merritt.

Appendix E

5 U.S.C. § 551 provides as follows:

Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or

describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

5 U.S.C. § 553 provides as follows:

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 702 provides as follows:

Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review

thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or implicitly forbids the relief which is sought.

5 U.S.C. § 704 provides as follows:

Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706 provides as follows:

Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5594

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff-Appellant,

—against—

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

BRIEF OF APPELLANT BROWN & WILLIAMSON TOBACCO CORPORATION

PRELIMINARY STATEMENT

In an astounding departure from fifteen years of consistent agency conduct, the Federal Trade Commission on June 25, 1982 expelled Brown & Williamson's Barclay brand from the government's official cigarette testing and reporting program. Specifically, the Commission

—retroactively deleted Barclay from the *December 1981* FTC "Tar" and Nicotine Report,

—directed the FTC laboratory to exclude Barclay from future Commission tests of all brands of domestically marketed cigarettes, and

—denied Barclay the right to rely, in its advertising, on the official FTC machine testing method. Only Barclay

was so treated, even though virtually all ultra-low "tar" cigarettes were found to "deliver" to consumers more "tar" than they deliver to the official FTC testing machine.

The FTC's actions inflict grievous legal and economic injuries upon Brown & Williamson. The Commission would prevent Brown & Williamson from marketing its products the way its competitors do. In a market where FTC ratings are crucial to effective competition, Barclay would be the only brand without "tar" or nicotine numbers. Further, Barclay's banishment by a powerful federal agency seriously affects Brown & Williamson's reputation for integrity in the marketplace. And the FTC's actions make Brown & Williamson vulnerable, for the first time, to a variety of legal risks from which every other tobacco company is protected.

The Commission's ruling shatters a government-industry agreement that both requires and permits cigarette advertisements to rely on the FTC testing methodology and on the official FTC reports.

Brown & Williamson immediately commenced this suit in the Western District of Kentucky to nullify the Commission's action on the grounds that it is improper rulemaking, arbitrary, capricious and discriminatory. To preserve the status quo pending a final determination on the merits, Brown & Williamson sought temporary and preliminary injunctive relief. A temporary restraining order effectively staying the Commission's rulings was entered on June 25, 1982, by the Honorable Boyce F. Martin, Jr., sitting by designation. After hearing oral argument on the merits on July 23, the Honorable Thomas A. Ballantine, Jr. continued the restraint pending his decision on the motion for a preliminary injunction.

But the district court never reached Brown & Williamson's arguments on the merits. Instead, on September 27, 1982, Judge Ballantine denied preliminary injunctive relief and dismissed the complaint on the sole ground that the FTC's actions were not reviewable because they were not "final agency

action" under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*•

The district court's "no final agency action" decision is the single subject of this appeal. We argue in this brief that there is no legal or factual basis to support a denial of judicial review of the FTC's actions at this time because:

—The Commission's deliberations regarding Barclay are at an end. Its determinations, stated in the most definite terms possible, will not be reconsidered in a pending or future agency proceeding.

—Brown & Williamson's challenges to the legality of the Commission's conduct raise purely legal issues that require no further factfinding at the agency level for clarification. The evidence upon which the Commission based its decisions is before the district court.

—The impact of the Commission's actions on Brown & Williamson's business, as well as on its legal status, rights and obligations, will be felt as soon as the FTC is permitted to act. Even if the FTC never brings an enforcement proceeding against Brown & Williamson, the company will suffer devastating competitive and reputational injury as a result of the Commission's "delisting" of Barclay.

—Effective judicial review of the FTC's actions will not be available at some future date. There is no means, other than this action, to obtain review of the Commission's decision to cease testing and reporting Barclay; and review of the Commission's other actions is possible only if Brown & Williamson defies the Commission's orders and subjects itself to legal risk. The law

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• The district court immediately thereafter granted Brown & Williamson's motion for an injunction pending appeal. Judge Ballantine restrained the Commission from acting until this Court has an opportunity to review the decision below. (Order entered September 27, 1982). On October 28, 1982, this Court denied the FTC's motion to vacate that injunction, finding that the district court had not abused its discretion.

does not require a party to suffer this exposure as the price for vindicating its rights.

—Even if the FTC *does* bring an enforcement proceeding in the future, the issue of whether Barclay's advertising is unfair or misleading will be adjudicated in a legal and factual context different from that existing today: the decision below permits the Commission to change the facts—for example, by rescinding Barclay's pre-existing FTC ratings—before bringing any proceeding against Brown & Williamson.

Because the Commission's actions annul Brown & Williamson's present rights, compel it to change its business practices, expose Brown & Williamson to liability both in enforcement proceedings and in private suits, and irremediably harm its reputation in the marketplace, they are final agency action, fully subject to judicial review at this time.

QUESTION PRESENTED

Did the district court err in dismissing the complaint for lack of jurisdiction and denying preliminary injunctive relief on the ground that the actions taken by the FTC were not final agency action subject to judicial review where:

(i) The FTC's actions have a direct immediate effect on Brown & Williamson's legal status, rights and obligations;

(ii) The FTC's actions have a substantial immediate impact on Brown & Williamson's day-to-day business;

(iii) judicial review will not interrupt, impede or disrupt an ongoing agency enforcement proceeding;

(iv) the questions presented to the district court are legal rather than factual, and no further agency process remains for further refinement of the issues;

(v) judicial review will expedite, not delay, final resolution of the issues presented; and

(vi) withholding judicial review will cause great hardship to Brown & Williamson?

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings, and the Disposition Below

As is more fully described below, Brown & Williamson appeals from the dismissal of its Complaint seeking preenforcement review of an order and determinations made by the Federal Trade Commission on June 25, 1982. The district court also denied plaintiff's request for a preliminary injunction. Both decisions were based on a single legal conclusion, *i.e.*, the FTC's determinations and order were not "final agency action" now ripe for judicial review. The district court granted Brown & Williamson's motion for an injunction pending appeal, and this Court has denied the FTC's motion to vacate that injunction.

STATEMENT OF FACTS

The Parties

Brown & Williamson is a Delaware corporation with its principal place of business in Louisville, Kentucky. It is engaged, among other activities, in the business of manufacturing and selling cigarettes. (Complaint, p. 2, ¶ 5).

The Federal Trade Commission is an administrative agency of the United States, created and existing under and by virtue of the Federal Trade Commission Act, 33 Stat. 717 (1914) as amended, 15 U.S.C. §§ 41 *et seq.* (hereinafter, the "FTC Act").

The FTC Cigarette Testing and Reporting Program

Since 1967, the FTC has operated a laboratory that measures the "tar" and nicotine yields of domestically marketed cigarettes by means of a testing methodology that has come to be known as the "FTC method."

The FTC method uses a smoking machine that takes puffs of standard size, frequency and duration, and "smokes" all cigarettes to a uniform length. When the Commission adopted its testing methodology fifteen years ago, it acknowledged that

the FTC method did not and could not replicate "average" human smoking behavior or measure the amount of "tar" or nicotine that cigarettes actually deliver to the human smoker. Rather, the FTC method was designed to provide a uniform yardstick for measuring how much "tar" and nicotine are generated when a cigarette is "smoked" in a specified manner on the FTC machine. (Affidavit of Martin London, sworn to June 25, 1982 (the "6/25/82 London Aff't."), ¶ 11; Ex. C).

In the Statement of Considerations accompanying the adoption of the FTC method, the Commission stated:

> *In determining the testing method, the Commission has not attempted to gauge the test to the amount of smoke, or tar and nicotine, which the "average" smoker will draw from any particular cigarette.*
>
> *No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion.* The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the tar and nicotine quantity in the smoke generated.
>
> *The Cambridge Filter Method* [the "FTC method"] *does not and cannot measure these many variations in human smoking habits.* It does not measure tar or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, *but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method. . . . There are too many variables as to both smokers and smoking conditions for any average to be meaningful.*

> *Thus, to reiterate, the uniform method determined by the Commission has as its purpose measurement of the tar and nicotine generated by cigarettes when smoked according to that procedure.*

(6/25/82 London Aff't., Ex. C; emphasis added).

Using the FTC method, the Commission has tested domestic cigarettes since 1967, and has regularly published the results of those tests in its official FTC "Tar" and Nicotine Reports. (6/25/82 London Aff't. ¶¶ 7, 10, 12).

Pursuant to a 1970 agreement between the Commission and the tobacco industry, all cigarette advertisements since that date have contained a statement of the "tar" and nicotine yields of the advertised brand as determined by the FTC method or published in the most recent FTC "Tar" and Nicotine Report. (6/25/82 London Aff't. ¶¶ 13-18; Ex. G). The 1970 agreement was the product of negotiations between the tobacco industry and the Commission aimed at devising a cigarette advertising program that would avoid the cumbersome proceedings for promulgating a formal Trade Regulation Rule requiring cigarette advertisements to state FTC "tar" and nicotine yields. (6/25/82 London Aff't. ¶¶ 14-16; Ex. F). By its terms, the agreement is predicated on the FTC's continued testing of all cigarettes by its "present methodology" and publishing the test results regularly in official FTC reports. (6/25/82 London Aff't. ¶ 16; Ex. G).

As a result of the 1970 agreement, tobacco companies, including Brown & Williamson, incurred certain obligations and acquired certain rights. On the one hand, cigarette manufacturers are required to state in every cigarette advertisement the brand's "tar" and nicotine yields as published in the most recent FTC "Tar" and Nicotine Report. In the case of a new brand, not yet published in an FTC Report, the manufacturer must nevertheless advertise the figures that are obtained by the FTC method. On the other hand, tobacco companies may advertise a cigarette's "tar" yield, or claim that one brand is lower in "tar" than another, based solely on the yields obtained by the FTC method. Indeed, citation of the FTC method as

substantiation for advertising claims regarding a product's "tar" or nicotine is a virtual shield against the risk that a tobacco company could be charged by the Commission with misleading advertising. (Complaint, p. 5, ¶ 15; Answer, p. 2, ¶ 15).

In recent years, as smokers have become more concerned with the "tar" yield of their cigarettes, these FTC numbers have become vital components of cigarette marketing, especially in the highly competitive low and ultra-low "tar" segments of the market.* (Affidavit of Scott A. Wallace, sworn to June 25, 1982 (the "Wallace Aff't."), ¶ 6). Because the FTC method is objective, clear and uniform, cigarette manufacturers are able to develop new brands and marketing strategies with accurate knowledge of the FTC numbers their products will obtain. For example, a manufacturer can plan to introduce a 1 mg "tar" cigarette and invest substantial resources in that project, because the company can know in advance that its proposed cigarette will measure 1 mg "tar" by the FTC method. (Affidavit of Ernest Pepples, sworn to September 27, 1982, ¶ 5).

Barclay and the FTC Inquiry

In 1980, Brown and Williamson had but a 13% share of the domestic cigarette market, and its share was on the decline. (Wallace Aff't. ¶ 3). After years of research and an investment of millions of dollars, Brown & Williamson developed Barclay—a cigarette with an innovative filter design that measured 1 mg "tar," 0.2 mg nicotine by the FTC method. Brown & Williamson made this effort in order to gain a foothold in the growing ultra-low "tar" segment of the cigarette market—the only portion of the total market that is currently expanding. (Wallace Aff't. ¶ 7). In January 1981, Barclay was launched with a $150 million advertising and promotional campaign. That campaign makes two claims that emphasize Barclay's low

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* Low "tar" cigarettes have FTC ratings of 6 or 7 to 12 mg "tar," and ultra-low "tar" cigarettes have ratings of less than 5 or 6 mg "tar."

"tar" rating and good taste: 1) "The Pleasure is Back"; and 2) "99% 'tar' free." In addition, all Barclay packs and cartons carry either the "1 mg 'tar' " or "ultra-low 'tar' " label.*

Barclay's instant popularity proved an unwelcome competitive challenge to the duopoly of R.J. Reynolds Tobacco Company, Inc. and Philip Morris Incorporated, the two industry leaders who together control 65% of the domestic cigarette market. (Wallace Aff't. ¶¶ 3, 7-8).** Faced with Barclay's success, R.J. Reynolds and Philip Morris asked the FTC, in June and July 1981, to alter the FTC method so that Barclay's "tar" and nicotine ratings would be significantly increased, while their own products would be unaffected. Though neither company disputed that Barclay measures 1 mg "tar" on the FTC smoking machine, they claimed it delivers more "tar" to smokers, because of the way human lips interact with the Barclay filter. R.J. Reynolds and Philip Morris each had a different theory on how that occurred, and each proposed a testing modification that would adversely affect Barclay, but not their *own* brands. (6/25/82 London Aff't. ¶¶ 24, 25.)

The FTC staff thereupon commenced a confidential inquiry into these allegations, with participation limited to the six major domestic cigarette manufacturers and three consultants retained by the FTC to comment on the data submitted by the companies. While the FTC inquiry focused on Barclay, it also raised questions as to the validity of the FTC method for measuring all low and ultra-low "tar" brands. Significantly, the inquiry produced considerable evidence that smokers can interfere with the filtration systems of *all* ultra-low "tar" brands

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* Barclay's 1 mg "tar," 0.2 mg nicotine ratings appeared in the December 1981 official FTC "Tar" and Nicotine Report. In compliance with the terms of the 1970 Commission-industry agreement, all Barclay advertisements cite that report.

** The most recent compilation of industry statistics, completed subsequent to the submissions below, shows R.J. Reynolds and Philip Morris have increased their collective share to 66.4% of the domestic market. John C. Maxwell, Jr. "The Maxwell Report: Year-End Sales Estimates For The Cigarette Industry," October 28, 1982, p. 2.

and otherwise adjust their smoking behavior so as to obtain substantially more "tar" and nicotine than the FTC numbers indicate—a process known as "compensation."

On Friday, June 25, 1982, the FTC inquiry ended. With no prior notice to Brown & Williamson, the Commission—in a closed meeting—determined that the FTC testing method does not accurately measure the amount of "tar" and nicotine that Barclay delivers to real smokers.* Despite its acknowledgement that compensation can occur with other low and ultra-low "tar" ciagarettes as well, the Commission took action only as to Barclay. The Commission voted to: 1) retroactively "delist" Barclay by amending its December, 1981 "Tar" and Nicotine Report; 2) exclude Barclay from its official testing and reporting program "unless and until" the FTC changes its present cigarette testing methodology; and 3) immediately prohibit Brown & Williamson from relying on the FTC method to substantiate claims that Barclay is a 1 mg "tar," 0.2 mg nicotine cigarette.**

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* The FTC's determinations about how people smoke Barclay were based on data submitted by R.J. Reynolds and Philip Morris during the inquiry. Neither the FTC nor its consultants conducted any tests of their own.

Brown & Williamson consistently contended that its competitors' data on which the Commission relied could not prove anything about real-life human smoking behavior, because it was derived from studies conducted not in natural smoking conditions, but in highly artificial laboratory settings, using equipment that was specifically designed by those competitors to produce results injurious to Barclay. In addition, we maintained that if the Commission wished to attempt to measure what cigarettes actually deliver to people in the real world, it must consider *all* the ways in which human and machine smoking differs from the machine standard. For example, larger and more frequent puffs, deeper inhalation, etc., all affect the amount of "tar" and nicotine a real smoker ingests. Remarkably, these contentions went unheeded.

** These actions were to be accomplished by means of an official announcement in the Federal Register. A copy of that Federal Register notice was filed with the district court as FTC Exhibit 146 (under seal). While the notice states that "the Commission does not mean to imply that Brown & Williamson. . .has violated any provision of the [FTC] Act for its *past* use and reliance on the FTC method" (emphasis added), the Commission

In effect, the Commission fashioned a new (but unspecified) "human smoking" standard and applied it to Barclay alone; the existing FTC test method may continue to be used by every other brand, without regard to human smoking behavior.

At the close of the Commission's meeting, it held a press conference, and distributed a press release announcing the Commission's determinations and actions.*

THE PROCEEDINGS BELOW

Immediately upon learning of the FTC's decision, Brown & Williamson commenced this litigation in the United States District Court for the Western District of Kentucky to enjoin the FTC, temporarily and permanently, from taking the actions it had announced. That afternoon, Judge Boyce Martin, sitting by designation, issued a temporary restraining order to maintain the status quo. (Order to Show Cause and Temporary Restraining Order, entered June 25, 1982). Judge Martin's instructions made clear that the filing of the FTC's proposed Federal Register notice was restrained as well. (Letter of FTC General Counsel John H. Carley to Martin London, dated June 30, 1982).

The July 6 hearing date before Judge Ballantine was adjourned at the FTC's request. With the Commission's consent, the court continued the TRO until Brown & Williamson's motion for a preliminary injunction could be heard and determined. (Order, entered July 6, 1982).

In moving for preliminary injunctive relief, Brown & Williamson contended that the actions announced by the FTC on June 25 were unlawful for two reasons:

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determined on June 25 that the above sanctions were to be effective from that day forward. The notice also solicits public comment on *whether* the FTC should "explore" further changes in the FTC method in light of the compensation phenomenon. As to Barclay, however, the questions are limited to addressing *how*, not whether, to change the smoking machine.

* A copy of this press release was filed with the district court as FTC Exhibit 145 (under seal).

(1) The Commission failed to provide notice of its proposed rule, solicit public comment thereon, or publish the new rule in the Federal Register at least thirty days prior to its effective promulgation, all in violation of the rulemaking requirements of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 553. Until June 25, all cigarette advertising could rely exclusively on the results produced by the FTC smoking machine without regard to human smoking behavior. On June 25, the Commission applied—to Barclay alone—a new requirement, *i.e.*, proving that people actually smoke just like the machine. In changing the rules in this way, the Commission failed to provide any of the required procedural safeguards. The Commission's actions, therefore, are unlawful and should be set aside pursuant to Section 10(e) of the APA, 5 U.S.C. § 706(2)(D).

(2) The Commission's actions were arbitrary, capricious and an abuse of agency discretion under 5 U.S.C. § 706(2)(A) because, *inter alia*, they unfairly discriminated against Barclay, were not supported by the evidence before the Commission, were impermissibly retroactive and arbitrarily timed. Further, the new "human smoking" standard used by the Commission to expel Barclay was unreasonable. The Commission itself does not know what Barclay—or any other brand—delivers to real smokers. Thus the new standard is too vague to provide guidance or permit reasonable compliance.

The district court never reached Brown & Williamson's substantive arguments for enjoining the Commission's actions pending trial. Instead, on September 27, 1982, the Court denied preliminary relief on the ground that the FTC's actions were not "final agency action" subject to judicial review under Sections 10(a) and 10(c) of the APA, 5 U.S.C. §§ 702, 704, and dismissed the complaint for lack of jurisdiction.

THE DISTRICT COURT'S DECISION

In its memorandum opinion, the district court noted the "fiercely competitive" nature of the cigarette industry and the important role played by FTC "tar" and nicotine ratings in that competitive battle. (Memorandum, p. 2). The court also found that "[t]he FTC reached a determination that it would prohibit plaintiff from relying on the FTC method when advertising Barclays" (*id.*, p. 3), and that the Commission's proposed June 25th Federal Register filing would "effectually delet[e] Barclay's ratings." (*Id.*, p. 4) The opinion, however, omits any mention of the third action taken by the FTC on June 25th: ceasing the testing and reporting of Barclay's "tar" and nicotine yields "unless and until" the Commission decides to modify the FTC test method.

The opinion went on to identify the "threshold" issue as "whether the *restrained publication* is 'agency action' as that term is used in Title 5 U.S.C. Section 702." (Memorandum, p. 5, emphasis added). The memorandum opinion, however, plainly indicates that the lower court's concern was not whether it was presented with "agency action" at all, but whether there was "*final* agency action" subject to judicial review under 5 U.S.C. § 704. Before addressing that question, the district court cited two recent cases of this Circuit—*Dairymen, Inc.* v. *Federal Trade Commission*, 684 F.2d 376 (1982) and *First National Monetary Corp.* v. *Commodity Futures Trading Commission*, 677 F.2d 522 (1982)—for the proposition that unless the challenged "*publication*" is final agency action, "judicial consideration of [Brown & Williamson's] claim is forbidden." (Memorandum, p. 5).*

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* Brown & Williamson sought to restrain the actions the Commission determined to take against Barclay. The restraint of the Federal Register notice resulted from the Commission's decision to trigger its actions by means of that notice. The lower court's repeated references to the *proposed publication* suggests that it focused more on the Federal Register filing than the actions accomplished thereby, and thus misconstrued the essence of Brown & Williamson's claims.

In the remaining portion of its decision, the district court ruled that the proposed publication was not final agency action.* Paraphrasing the Supreme Court's language in the inapposite case of *Federal Trade Commission* v. *Standard Oil Co. of California*, 449 U.S. 232 (1980), Judge Ballantine concluded:

> . . . FTC's proposed publication in the Federal Register is not a definitive ruling or regulation. It has no legal force or practical effect on plaintiff's daily business other than the disruptions that accompany any major litigation. Immediate judicial review would serve neither efficiency nor enforcement of the [Federal Trade Commission] Act. These pragmatic considerations counsel against the conclusion that the proposed publication is final agency action.
>
> In view of our conclusion we must determine that plaintiff cannot satisfy the first test of *Mason County Medical Association*, *supra*, and the Court's ultimate determination is that it is without jurisdiction to review the proposed action. [Memorandum, pp. 5-6].

While Brown & Williamson agrees that the availability of judicial review of the FTC's actions rests on the pivotal issue of finality, we respectfully suggest the district court's analysis of that issue missed the mark.

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* Because of its ruling on the likelihood of success factor, the district court did not address Brown & Williamson's contention that it satisfied the three additional requirements for a preliminary injunction established in *Mason County Medical Association* v. *Knebel*, 563 F.2d 256 (6th Cir. 1977). In issuing an injunction pending appeal, however, the district court expressly found that interim relief was necessary "to prevent the occurrence of immediate and irreparable injury to plaintiff . . . [and] that no substantial harm to other parties will result from such relief, and that such relief will not harm the public interest . . ." (Order, entered September 27, 1982).

ARGUMENT

I

THE FTC'S DETERMINATIONS ARE REVIEWABLE BY THE DISTRICT COURT

The Commission's June 25 order expels Barclay from the FTC cigarette testing and reporting program, and radically alters Brown & Williamson's legal status. That order is directly reviewable by the district court because the FTC action is final and otherwise ripe for determination.

The Abbott Laboratories *Standard*

The starting point for any discussion of the issue of ripeness is *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). In a case directly analogous to the one at bar, the Supreme Court reversed the Third Circuit's dismissal of a complaint seeking pre-enforcement review of regulations promulgated by the Secretary of Health, Education, and Welfare. The Secretary's regulations required that drug companies use generic names on all labels, advertisements and other printed matter relating to prescription drugs.

The circuit court had dismissed the complaint because it found (i) provisions of the Federal Food, Drug and Cosmetic Act specifically negated pre-enforcement review of the regulations in question, and (ii) there was no warrant for such review under the APA, 5 U.S.C. §§ 701-704. The Supreme Court began its analysis with a restatement of the law relating to judicial review of administrative action:

> [A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress [citations omitted]. Early cases in which this type of judicial review was entertained, [citations omitted] have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering

> legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," . . . The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. [citations omitted] . . . [O]nly upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review. [387 U.S. at 140-41 (footnote omitted)].

After concluding that the language of the Food, Drug and Cosmetic Act did not preclude preenforcement review, the court went on to discuss the "ripeness" of the controversy:

> [T]he ripeness doctrine['s] . . . basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. [387 U.S. at 148-49].

The Court then pronounced the two-prong test that remains today the standard measure of reviewability:

> The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. [387 U.S. at 149].*

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* Subsequent decisions have refined the analysis even further. In *Midwestern Gas Transmission Co. v. Federal Energy Regulatory Commission*, 589 F.2d 603, 618 (D.C. Cir. 1978) (footnote omitted), the court stated:

The Court discussed a number of factors that indicated the dispute was "fit" for adjudication.

First, the dispute was "purely legal." 387 U.S. at 149.

Second, the Court concluded the regulations were "agency action" within the meaning of Section 10 of the APA, 5 U.S.C. § 704. "An 'agency action' includes any 'rule,' defined by the Act as 'an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,'. . ." 387 U.S. at 149.

Third, the Court concluded the regulations were final after applying the "pragmatic" test utilized in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942), *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). 387 U.S. at 149-51. In *Columbia Broadcasting*, the Court held reviewable a regulation of the FCC relating to future contracts among broadcasters. Because no license had yet been denied or revoked, the challenged regulation could properly be construed

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> [W]hat we must determine under [the *Abbott*] test is whether the agency action is sufficiently final or definitive so that we would have no interest in postponing review until the issues are more concrete. If the court's interest tends towards postponement, we must then weigh this consideration against the immediate impact of the actions on the challengers, and whether the impact is so harmful that present consideration is warranted.

See also Young v. *Klutznick*, 652 F.2d 617, 625 (6th Cir. 1981) *cert. denied sub nom. Young* v. *Baldridge*, 102 S. Ct. 1430 (1982). A district court in this Circuit has identified the following factors:

> (1) whether the process of administrative decision-making has reached the stage where judicial review will not disrupt the orderly process of adjudication;
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> (2) whether the particular questions involved are more legal or factual in nature;
>
> (3) whether rights or obligations have been determined or legal consequences will flow from the agency action; and
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> (4) the relative hardship to the parties of withholding court consideration at this time.

Cumberland Capital Corp. v. *Harris*, 490 F. Supp. 551, 556 (M.D. Tenn. 1977), *rev'd in part on other grounds*, 621 F.2d 246 (6th Cir. 1980).

as a statement of intention only. Nevertheless, the Court held those regulations "have the force of law before their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack . . ." 316 U.S. at 418-419. In *Frozen Food*, an ICC order specifying categories of commodities within a given statutory class was under attack. The dissent in *Frozen Food* argued that the order had merely given notice as to how the Commission *interpreted* the statute and that it would have effect only if and when a particular action was brought against a particular carrier. 351 U.S. at 45-47. Nonetheless, the Supreme Court held the order reviewable. And in *Storer Broadcasting*, the FCC announced that it would not, in the future, license any applicant who already owned five television stations. The Court found that even though no specific application was then before the Commission, an owner of five stations was aggrieved and could challenge the "final agency action" by the Commission. 351 U.S. at 198.

Fourth, the *Abbott Laboratories* Court noted that the impact of the regulations was "sufficiently direct and immediate as to render the issue appropriate for judicial review. . . ." 387 U.S. at 152. The regulations purported to give an "authoritative interpretation . . . that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. . . . If petitioners wish to comply they must change all their labels, advertisements and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies." 387 U.S. at 152 (footnote omitted).

The Court also acknowledged the government's claim that this was a matter of great importance to the public, but concluded that this was but another reason for judicial review:

> "To require [drug manufacturers] to challenge these regulations only as a defense to an action brought by the

> Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the court under the Administrative Procedure Act and the Declaratory Judgment Act *must be permitted*, absent a statutory bar or some other unusual circumstance, neither of which appears here. [387 U.S. at 153 (emphasis added)].

The court was not dissuaded by the government's argument that criminal sanctions would be foresworn. 387 U.S. at 154.

In concluding, the Supreme Court held petitioners' application for pre-enforcement review of the regulation was appropriate, and denied the government's request to consider the merits until after the Third Circuit had the opportunity to deal with that subject.

Abbott Laboratories and the cases following it demonstrate clearly that the district court's order should be reversed.

The Issue is "Fit" for Judicial Decision

The *Abbott Laboratories* decision and its progeny have identified a number of factors that comprise the "fitness" test. Every one of them demonstrates that the dispute here is "fit" for judicial determination now.

A. Legal Issues Only Are Involved Here

In the district court, Brown & Williamson presented two legal challenges to the Commission's June 25th actions—that they constituted substantive rules issued without the rulemaking procedures required under 5 U.S.C. § 553, and that they were so arbitrary, capricious and discriminatory in their form and content as to constitute an abuse of agency discretion under 5 U.S.C. § 706.

Both parties submitted the case below on the law. Neither side argued to the district court that further fact-finding was necessary to decide the issues presented. And, in fact, the

district court's decision was based exclusively on the pleadings and exhibits before it, together with the oral argument. *See Independent Bankers Association of America* v. *Smith*, 534 F.2d 921, at 927 (D.C. Cir.), *cert. denied sub nom. Bloom* v. *Independent Bankers Association of America*, 429 U.S. 862 (1976) (district court decision based on motion for summary judgment and stipulated facts involved purely legal issues).

There can be no doubt that a challenge based on Section 553 to an agency's rulemaking process is a purely legal issue ripe for judicial consideration. *Phillips Petroleum Co.* v. *Federal Energy Administration*, 435 F. Supp. 1239, at 1245-46 (D. Del. 1977). Since rulemaking procedures were undisputedly ignored in this case, the only relevant question on this aspect of Brown & Williamson's suit is whether such procedures were required—*i.e.*, were the Commission's June 25th determinations substantive rules with legal consequences, or were they merely general statements of policy to which the Section 553 procedural requirements do not apply? "In simplest terms, the sole issue for the Court to decide is whether the regulations are valid. The legality of the challenged regulations is not an issue which requires further factfinding before an agency." *Texas Energy Reserve Corp.* v. *Department of Energy*, 535 F. Supp. 615, 523 (D. Del. 1982).

Should the district court find Brown & Williamson likely to prevail on its rulemaking argument, it need not reach Brown & Williamson's other legal challenges. And these challenges too present legal issues that will never be made more concrete or fit for judicial consideration by further agency proceedings. Those issues are: 1) May the FTC lawfully apply a human smoking standard to Barclay, and a machine smoking standard to its competitors? 2) Did the Commission act with arbitrary haste under the circumstances? 3) Were the Commission's actions unlawfully retroactive? and 4) Did the FTC provide Brown & Williamson with a clear standard that provides a meaningful opportunity to comply in the future?

Again, the FTC has claimed that it has submitted to the district court the entire record upon which its actions were based. To resolve Brown & Williamson's substantive challenge,

the district court need only apply the law to the facts already before it. *See, e.g., National Distillers and Chemical Corp.* v. *Department of Energy*, 498 F. Supp. 707, at 716 (D. Del. 1980), *aff'd*, 662 F.2d 754 (Temp. Emer. Ct. App. 1981).

In sum, each of the legal issues presented by Brown & Williamson will be no more fit for judicial resolution later than they are today.

B. The Action of the Commission was "Final"

In its proposed Federal Register filing, issued "[b]y direction of the Commission,"* the FTC announced that it "*determined* that its present testing methodology for 'tar', nicotine and carbon monoxide does not measure accurately Barclay cigarettes"; that it "*determined it will not accept* test results based on the current FTC method as substantiation for [Barclay "tar" and nicotine claims]"; that it is "*amending* its December, 1981" report; and that "unless and until" the FTC method is changed, "future reports *will not* include test results for those cigarettes" (emphasis supplied). As determinations issued by the Commission itself, each of these pronouncements is " 'presumptively final' unless it indicates on its face that it is tentative and subject to reconsideration." *Cumberland Capital Corp.* v. *Harris*, *supra*, 490 F. Supp. 551, 557 (quoting *Na-*

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* The order under attack is a formal determination issued by the entire Commission at a scheduled meeting apparently held expressly for that purpose. And the resulting decision was to be inserted in the Federal Register so that previously existing formal government ratings would be changed. Government utterances of far less formality have been held to be final agency action. *See, e.g., National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F.2d 689, at 698-99 (D.C. Cir. 1971) (letter from Wage-Hour Administrator to industry lawyer advising of interpretation of statutes); *Independent Bankers Association* v. *Smith*, *supra*, 534 F.2d 921, at 928-29 ("interpretive ruling" of the Comptroller of Currency construing statute); *Phillips Petroleum Co.* v. *Federal Energy Administration*, *supra*, 435 F. Supp. 1239, at 1246 (FEA interpretation of regulations as contained in public letter, *a brief*, and a Federal Register filing); and *Standard Oil Co.* v. *Federal Energy*, 440 F. Supp. 328, at 360-70 (N.D. Ohio 1977) (current interpretation of price control regulations).

tional Automatic Laundry v. *Shultz*, *supra*, 443 F.2d 689, 701).

Quite clearly, there is nothing at all tentative about these determinations, and the Commission has expressed no willingness to reconsider its position—its deliberation on these matters has come to an end.* As to these three actions, "there [is] nothing else for the Commission to do." *See Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

In deciding that the FTC's actions were not final, the court below relied on *Federal Trade Commission* v. *Standard Oil Co. of California*, 449 U.S. 232 (1980), *Dairymen Inc.* v. *Federal Trade Commission*, 684 F.2d 376 (6th Cir. 1982), and *First National Monetary Corp.* v. *Commodity Futures Trading Commission*, 677 F.2d 522 (6th Cir. 1982)—each of which merely holds that courts will not adjudicate the propriety of an ongoing enforcement proceeding before its completion. But here there *is no* ongoing enforcement proceeding that the court's review could possibly disrupt.

Moreover, the Commission remains free to initiate such a proceeding and attempt to obtain an injunction against Brown & Williamson at any time. That the Commission has not commenced such an action against Brown & Williamson thus

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* Indeed, FTC Chairman Miller has repeatedly characterized the Commission's actions as the agency's final position on the matters they address. On June 25, 1982, he wrote that the proposed Federal Register notice "announces the Commission's *determination* and *action* . . ."; that the Commission "has *determined* that Barclay cigarettes (all varieties) are not assessed accurately"; and that "the Commission *will not accept* test results based on the current FTC method as substantiation" for Barclay's "tar" and nicotine claims. (Letter dated June 25, 1982 from FTC Chairman James C. Miller, III to Ernest Pepples, Senior Vice President and General Counsel of Brown & Williamson, submitted to the district court as FTC Exhibit 144, under seal) (emphasis added). And again, on July 15, 1982, Chairman Miller wrote of the "Commission's *findings*," adding that "Brown & Williamson may need time to adjust its advertising in reaction to the Commission's *determinations*." (July 15, 1982 letter of FTC Chairman Miller to Ernest Pepples, submitted to the district court as FTC Exhibit 148, under seal) (emphasis added).

far can perhaps be explained by the Commission's desire to change the facts and law first so as to undermine Brown & Williamson's rights in any such proceeding. (For example, a charge that Barclay's claim of "1 mg 'tar' FTC Report Dec. 1981" is misleading would have a drastically different status after an amendment of the December, 1981 report.) Action that affects a party's legal rights in this matter is precisely the kind of substantive rule repeatedly held final for the purposes of judicial review. *Nader* v. *Civil Aeronautics Board*, 657 F.2d 453, at 456 (D.C. Cir. 1981); *Dow Chemical, USA* v. *Consumer Products Safety Commission*, 459 F. Supp. 378, at 386-87 (W.D. La. 1978).

In sum, the agencies' action here is "final," and judicial review of Brown & Williamson's claims at this time presents no possible danger of disrupting any enforcement proceeding by the Commission.

C. Judicial and Administrative Efficiency Will Be Served by Review at this Stage

As noted, Brown & Williamson's present suit does not impede an ongoing enforcement proceeding. In fact, judicial review now would *expedite* final resolution of the issues, and would conserve precious governmental resources.

In any appellate review of a future FTC enforcement action, Brown & Williamson obviously would raise the very same challenges it has raised to the district court. A later suit raising precisely the same issues involved in this action will be less efficient, more wasteful and unlikely to facilitate final resolution of these important questions.

Should Brown & Williamson's legal challenges be upheld by the district court, the Commission will be spared the fruitless effort of holding extensive enforcement proceedings in which it seeks to enforce an unlawfully adopted standard. The need for subsequent judicial review of that proceeding, involving exactly the same issues raised in the present action, will also be obviated. The Commission will be spared the substantial expense of changing the rules and enforcing those new rules

against Barclay, only to be told to "start all over again and do it right."

On the other hand, a ruling favorable to the Commission would confer judicial approval on the Commission's June 25 determinations, and on the manner in which it proposes to deal with the issues raised in the Federal Register filing, including future test modifications. Similarly, this litigation will clarify the legal effect of the 1970 industry-wide agreement, and the propriety of a radical, unilateral modification of the rights and obligations contained therein. As the court in *Phillips Petroleum Co.* v. *Federal Energy Administration*, *supra*, stated: "[T]hese actions simply seek to secure prompt judicial resolution of narrowly defined legal issues which may prove dispositive of the entire controversy . . ." 435 F. Supp. 1239, 1247-48.

Furthermore, if the district court enjoins the FTC's June 25th actions, it will greatly alleviate the judicial burden of adjudicating future injunctive actions by the Commission, and the multiple suits under the Lanham Act, 15 U.S.C. §§ 1501 *et seq.*, and similar state laws that Brown & Williamson's competitors can reasonably be expected to bring. Just as in *Independent Bankers Association* v. *Smith*, *supra*, 534 F.2d 921, at 928, where the courts otherwise would have been faced with a multiplicity of actions and parties, a finding of finality will save all those concerned, including the judiciary, the needless expense of future proceedings hopelessly infected with significant uncertainties.

The Hardship to Brown & Williamson Requires Judicial Review Now

The second prong of the *Abbott Laboratories* test requires the court to weigh the hardships imposed by a denial of judicial review.

In *Abbott Laboratories*, *supra*, the Court found the impact of the regulations on the petitioners was "direct and immediate." 387 U.S. 136, 152. By any realistic and pragmatic assessment, the FTC's June 25th actions have an equally direct

and immediate impact on Brown & Williamson. Should those actions go unreviewed, Brown & Williamson will be stripped of its right to rely on the current FTC method, Barclay will be de-listed from the most recent FTC report, and Barclay will be expelled from a long-standing governmental program that will continue to govern the "tar" and nicotine claims of its competitors. As in *Columbia Broadcasting System* v. *United States*, *supra*, 316 U.S. 407, 418, these actions "have the force of law before their sanctions are invoked as well as after."

Given the undisputed importance of "tar" and nicotine ratings to competition in the cigarette industry, the FTC's actions—singly and in combination—will cause harm to Brown & Williamson in several significant ways.

A. Brown & Williamson's Legal Status Will Be Adversely Affected

First, Brown & Williamson's legal status will be fundamentally changed. As a result of the interim relief thus far accorded in this action, Brown & Williamson today has an absolute right to rely in its advertisements on the FTC method and to cite the latest FTC "Tar" and Nicotine Report as support for its claims that Barclay is a 1 mg "tar," 0.2 mg nicotine cigarette. As soon as that interim protection is lifted, however, Brown & Williamson will lose that valuable right—in fact, Barclay will have no FTC numbers at all.

Thus, the June 25th determinations dramatically alter the standard that will determine whether Barclay's advertisements are deceptive or misleading.* In place of the FTC method and the 1970 Commission-industry agreement, Barclay will have no FTC numbers, and the validity of its advertisements will be governed by a new, hopelessly confused "human smoking"

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* The Commission could, as it has already indicated (Motion to Vacate Injunction Pending Appeal, p. 12, n.4), seek immediate injunctive relief against Brown & Williamson's advertisements under Section 13(b) of the FTC Act, 5 U.S.C. § 53(b). In such an action, Brown & Williamson would today have a virtually unassailable defense—its FTC ratings. If the Commission is allowed to act, however, that defense will disappear.

standard. The prospective application of this changed standard to determine compliance with a statutory mandate is a *rule* for the purposes of the Administrative Procedure Act, *Batterton* v. *Marshall*, 648 F.2d 694, at 704-06 (D.C. Cir. 1980), the promulgation of which requires prompt judicial review. *Nader* v. *C.A.B.*, *supra*, 657 F.2d 453, at 456. As the court stated in *Fort Sumter Tours, Inc.* v. *Andrus*, 440 F. Supp. 914, 918-19 (D.S.C.), *aff'd*, 564 F.2d 1119 (4th Cir. 1977), holding ripe for review a challenge to criteria issued by the National Park Service to determine the suitability of park concessionaires:

> The ultimate test of reviewability is not to be found in an over-refined technique, but in the need for review to protect from irreparable injury threatened in the exceptional case *by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow. A final Order for purposes of review need not necessarily be the very last Order.* (citations omitted) (emphasis added).

B. Subsequent Judicial Review May Not be Available

Second, later judicial review of at least some of Brown & Williamson's claims may never be available. The FTC's refusal to test or report Barclay's "tar" and nicotine for the indefinite future, for example, is not reviewable in an enforcement proceeding, and thus will escape judicial consideration altogether unless reviewed at this time.

C. Day-to-Day Business Operations Will Be Seriously Affected

Third, even if Brown & Williamson obtains limited review of the Commission's June 25th actions at some later date, the intervening legal and factual uncertainties have a monumental impact on the "day-to-day operation" of Brown & Williamson's business. As in *Abbott Laboratories*, the "expected conformity"* to the FTC's actions puts Brown & Williamson

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* FTC Chairman Miller's July 15 letter (*supra*, p. 22n.*) serves only to confirm that the Commission expects Brown & Williamson to radically alter

in an immediate quandary: it must either change its packaging and advertisements and abandon the marketing program upon which Barclay's success so vitally depends, or continue its present practices at the risk of substantial penalties. This excruciating and costly dilemma justifies prompt judicial review. *See Continental Air Lines, Inc.* v. *Civil Aeronautics Board*, 522 F.2d 107, at 126-27 (D.C. Cir. 1974); *A.O. Smith Corp.* v. *Federal Trade Commission*, 530 F.2d 515, at 524 (3rd Cir. 1976).

In this context, the facts of *Continental Air Lines* v. *C.A.B.* are particularly instructive. In that case, the Civil Aeronautics Board issued regulations that allowed airlines with high density seating configurations to charge higher fares. An airline with low density seating would not experience any economic disadvantage, however, until a subsequent administrative proceeding awarded a fare differential to a competing airline. Continental Air Lines thus was faced with the choice of maintaining its low density seating at the risk of later competitive disadvantage, or changing over to high density seating, at great cost, to meet the terms of a regulation it believed to have been unlawfully promulgated. Despite Continental's ability to challenge the C.A.B.'s new rule in any subsequent fare differential proceeding, the court refused to leave the petitioner in this predicament indefinitely, recognizing that aircraft "cannot be changed overnight," 522 F.2d at 127, and that the airline was stripped of the opportunity to make "definite plans." 522 F.2d at 128.

Like aircraft, an entire promotional campaign, involving newspaper and magazine advertisements, billboards, packaging and promotional aids, cannot be changed overnight. Just

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its advertising campaign for Barclay. Whereas before Brown & Williamson enjoyed the unquestioned right to rely on the FTC testing program and the December, '81 "Tar" and Nicotine Report, the July 15 letter directs Brown & Williamson to seek the Commission's approval for advertisements that "will be considered lawful" during the period that the Commission "determines whether to adopt a new testing methodology." And the Commission has set no end-point for this "interim" period—Brown & Williamson may not cite FTC method figures "*unless* and until" the official testing method is changed.

like Continental Air Lines, Brown & Williamson cannot now make rational business plans. It does not know either what standard will ultimately govern Barclay, or what it can do to gain Barclay's readmission into the FTC testing program. It cannot be sure the Commission will ever act; "unless and until" the FTC adopts a new standard, Brown & Williamson is consigned to a bureaucratic limbo. Thus, just like the petitioner in *Continental Air Lines*, Brown & Williamson labors under an onerous uncertainty unless its claims receive prompt judicial attention.

D. Brown & Williamson Will Be Exposed to Unprecedented Damage Claims

Yet another indicator in the "hardship" test is the adverse consequences to the petitioner if it chooses to ignore the administrative ruling it conscientiously believes to be invalid. In *Abbott Laboratories*, the Supreme Court relieved petitioner of the dilemma of deciding whether to obey an arguably invalid order or face severe legal consequences. Those consequences included the possibility of criminal sanctions. But even in the face of the government's assurance no criminal proceedings would be brought, the Court found the dilemma severe enough to require pre-enforcement judicial review. 387 U.S. 136, at 154.

Subsequent authorities also have held that the adverse consequences for a petitioner need not be penal in nature in order to justify his rescue. *National Automatic Laundry, supra*, ruled on the effect of the adverse consequences to the petitioners if they rejected the (Wage-Price) Administrator's ruling, but later suffered a judicial determination that the Administrator had been right all along. In its brief, the government argued that the peititioners were not faced with a "Hobson's choice" because "[t]hey can safely do nothing. If it later develops that the Administrator was correct and they should have raised their wages to meet the statutory minimum, they have only to pay back the additional wages they should have been paying all along." 443 F.2d 689, 696. The D.C. Circuit Court disagreed: if

the employers so acted they would be liable to *damage actions* by the affected employees. That risk, the court wrote, "cannot be passed off by Government lawyers as a prospect of no substantial legal consequence." 443 F.2d at 696. Noting the similarity to *Abbott Laboratories*, the *National Automatic Laundry* court wrote that even in the absence of criminal sanctions "the Government has no authority to waive the rights of the employees to sue for the double damages penalty." 443 F.2d at 697.

Analogously, the FTC determination here creates the same dilemma, the same "Hobson's choice" faced by petitioners in *Abbott Laboratories* and *National Automatic Laundry*: if Brown & Williamson chooses to ignore the administrative ruling it conscientiously believes invalid, then it risks economic sanctions as a result of liability to third parties—in this case, its competitors.

For if Brown & Williamson continues to claim that Barclay is "1 mg 'tar,' 0.2 mg nicotine by FTC Report Dec. '81" after the Commission (i) amends the December report, (ii) forbids Brown & Williamson's reliance on the FTC method, and (iii) issues new reports that omit Barclay, it can reasonably anticipate civil suits for misleading advertising brought by other members of the cigarette industry under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, or comparable state laws. Government lawyers have no authority to waive the rights of competitors to sue for such damages. This kind of newly created legal exposure is precisely the kind of impact that prompt judicial intervention should prevent. *Standard Oil Co. v. Federal Energy Administration*, *supra*, 440 F. Supp. 328, at 368.

E. Brown & Williamson Will Suffer Reputational and Competitive Injury

And there are intangible costs as well. If the Commission is not enjoined from acting, Brown & Williamson will be at a serious competitive disadvantage. It will be barred from effective competition in the growing ultra-low "tar" end of the market. Its market share will decline even further, to the profit

of the industry giants. Brown & Williamson's competitors will be free to seize on the absence of any Barclay test numbers in disparaging the product and touting their own brands. The mere disappearance of Barclay's FTC numbers will supply ammunition to competitors and confusion to consumers. The corrosive impact of that public perception will extend to all of Brown & Williamson's business, affecting its over-all reputation for commercial integrity and honesty in the marketplace. (Wallace Aff't. ¶ 12).

This injury to reputation has been recognized as a significant factor prompting judicial review of agency action. In *Dow Chemical, USA* v. *Consumer Products Safety Commission*, *supra*, 459 F. Supp. 378, 387, the court so held:

> Less tangible than the immediate economic burden with which the plaintiffs are threatened, but a relevant consideration nonetheless, is the continuing damage that the plaintiffs' reputations will necessarily be subject to as long as adjudication of the validity of the regulations is deferred. The Commission, according to these regulations, proposes to inform the public that plaintiffs are selling a product which is a carcinogen. Also uncertainty regarding the possible invalidity of the CPSC's regulations could make it difficult for plaintiffs to plan for the future production and distribution of their product.
>
> Thus, this administrative action imposes a penalty far more drastic than the fines customarily inflicted for breach of reviewable administrative orders. Only judicial review can avoid the threatened injury. It would be inequitable to deny the plaintiffs the opportunity to resolve this matter promptly.

These competitive and reputational injuries will occur *regardless* of whether the FTC ever brings an enforcement action. And, should the Commission choose to commence such a proceeding against Brown & Williamson, judicial review will "be a long time in coming." *Continental Air Lines* v. *C.A.B.*, *supra*, 522 F.2d 107, 127. In the interim, Brown & Williamson's business and credibility will suffer irreversible damage.

The judicial review Brown & Williamson might later obtain cannot make good that loss. For these reasons, too, Brown & Williamson seeks, and should fairly receive, immediate judicial review of its claims. *See, e.g., Standard Oil Co.* v. *Department of Energy*, 596 F.2d 1029, at 1039-40 (Temp. Emer. Ct. App. 1978); *Atlanta Gas Light Co.* v. *Federal Power Commission*, 476 F.2d 142, at 147-48 (5th Cir. 1973).

* * *

We respectfully suggest the sum of the hardships visited upon Brown & Williamson requires judicial review now.

II

"FINALITY" IS THE ONLY ISSUE ON THIS APPEAL

The district court's dismissal of the Complaint and denial of preliminary relief in this case rested exclusively on one point: the court believed the FTC's June 25 actions were not "final agency action" subject to judicial review. This narrow legal issue is the basis of Brown & Williamson's appeal, and is the only issue this Court need decide. *See Mason County Medical Association* v. *Knebel, supra*, 563 F.2d 256, at 261-62 (where the "gist" of the appeal was the district court's ruling on likelihood of success, appellate review was limited to that issue); *Securities and Exchange Commission* v. *G. Weeks Securities, Inc.*, 678 F.2d 649, at 651-53 (6th Cir. 1982) (same). Because the district court entertained an erroneous view of the law of finality as applied to the facts of this case, its dismissal of the Complaint and denial of injunctive relief should be reversed, and the case remanded for further consideration of Brown & Williamson's motion for a preliminary injunction.

CONCLUSION

The *en banc* decision by the D.C. Circuit in *Continental Air Lines, Inc.* v. *C.A.B.*, 522 F.2d 107, 128 (1974) provides that experienced court's composite views on the question before this tribunal. When is an administrative determination ripe for judicial review?

> "We do not pretend that the science of assessing an issue's ripeness is an exact one. Agency positions are never absolutely final. There is always some danger in accelerating the review process, and always some hardship in delaying it. If the analysis is an imprecise one, however, it may nevertheless yield clear results, as we think it has in this case. Any doubts we might have are resolved by the presumption of reviewability which we have previously said "premeates the *Abbot Laboratories* ruling." *National Automatic Laundry and Cleaning Council* v. *Schultz*, 143 U.S.App.D.C. 274, 443 F.2d 689, 694 (1971). The presumption stands on firm ground. However much the courts might prefer to resolve a particular question at another time and place, they should have a very good reason for indulging that preference, if in doing so they are refusing a petitioner's request to be relieved of an onerous legal uncertainty.

For all the reasons discussed above, Brown & Williamson urges this Court to reverse the decision below in all respects, reinstate the Complaint, and maintain the interim relief now in place pending the district court's decision of Brown & Williamson's motion for a preliminary injunction upon remand.

New York, New York
November 30, 1982

Respectfully submitted,

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Appendix G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5594

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff-Appellant,

—against—

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

REPLY BRIEF OF APPELLANT BROWN & WILLIAMSON TOBACCO CORPORATION

PRELIMINARY STATEMENT

Brown & Williamson commenced this litigation to protect the company's Barclay cigarette from the serious injury the Federal Trade Commission's June 25th actions would inflict. In the district court, we urged that the FTC's actions violated the procedural requirements of the Administrative Procedure Act ("APA") and constituted an abuse of agency discretion. Brown & Williamson's substantive rights were never adjudicated; instead, the district court denied preliminary injunctive relief and dismissed the complaint on the jurisdictional ground that there was no final agency action ripe for judicial review. Brown & Williamson appeals from that limited ruling. There is no cross-appeal.

In its principal brief, Brown & Williamson argues that the district court's lack-of-finality ruling was erroneous and should be reversed. The Commission's answering brief essentially avoids meaningful discussion of the pertinent precedents and instead takes a two-pronged diversionary approach: first, the Commission now describes the facts so as to make the FTC's June 25 actions appear less "final"; and second, the Commission submits a copious collection of irrelevant and prejudicial statements about the factual history of the FTC inquiry and other non-issues.* This reply will address only those factual and legal characterizations that are relevant to this appeal.

CORRECTION OF THE FACTS

One of the pivotal issues in the district court and on this appeal is whether the actions which Brown & Williamson seeks to have enjoined had any effect on the company's legal status, rights or obligations. In order to support its argument that the Commission took no reviewable agency action on June 25, the FTC's brief on appeal misstates (i) what the Commission *did* in June, and (ii) the nature of the official testing and reporting program from which Barclay has been banished.

A. The Commission's June 25 Actions

Because the Commission's mischaracterizations of its June 25 actions are so directly relevant to the issue to be decided by this Court, we set forth below in columnar fashion the Commission's current descriptions and compare them to the record facts.

The Commission's Brief	*The Record*
The Commission "announced the results of its in-	"*ACTION*: Announcement of *Commission Determina-*

* At several points, the FTC suggests that this Court vacate the district court's order for *in camera* treatment of FTC papers, entered on July 27 and continued on September 27, 1982. That issue is not before this Court. The FTC did not appeal from the district court's July 27 order, and its motion to vacate the September 27 order was denied by this Court on October 28.

vestigation, concluding that the Barclay cigarette was inaccurately measured" (p. 3), and that the December, 1981 "tar" and nicotine report "should be corrected." (p. 12).	*tion, Amendment of Past Report* and Request for Comment on Possible Test Modifications. . . . "The Commission *is therefore amending* its December, 1981 Report . . . ." (FTC Ex. 146, pp. 1, 3; emphases added).
"The Commission did not issue any order to B&W or to anyone else requiring it to do or not to do anything." (p. 3)	The Commission "determined it *will not accept [FTC] test results*" for Barclay (FTC Ex. 146, p. 2) and directed that Brown & Williamson "*cannot rely* on the FTC test method to substantiate claims that Barclay delivers only '1 mg. tar.'" (FTC Ex. 145, p. 1). The Commission obviously also ordered its own employees to cease testing and reporting Barclay cigarettes: "future reports *will not include* results for these cigarettes." (FTC Ex. 146, p. 3) (emphases added).
"The Commission did not even make any change in the FTC 'tar' testing method . . . ." (p. 3).	The Commission evicted Barclay from a program that still applies to every other cigarette on the market. (FTC Ex. 146, pp. 2, 3).
The Commission "merely sought to elicit public comment with a view toward changing the methodology in	Virtually every question posed in the Federal Register notice is targeted exclusively at Barclay. (FTC Ex. 146,

some undetermined manner at some undetermined future date." (p. 3).

pp. 5-8). Indeed, the notice asks whether a new holder should block two or three channels on the Barclay filter. (*Id.* p. 7).

B. The 1970 Agreement

Because the Commission concedes its June 25 actions are reviewable if Brown & Williamson's legal rights and obligations are affected, the FTC now denies such an impact. To support that position, the Commission argues that no rights or obligations flow from the 1970 agreement under which all cigarette advertisements disclose FTC test results. The agreement, says the FTC, is purely a unilateral decision by the companies, involving no participation by the FTC.

The Commission's Brief

"[W]hile B&W repeatedly characterizes the voluntary plan as a 'government-industry agreement' by which it acquired certain unspecified legal 'rights,' the *uncontroverted evidence in the record below established that no such agreement exists or was even discussed.*" (p. 6; emphasis added).

The Record

The "Statement of Commission Action", issued after the commencement of this litigation "By Direction of the Commission" states: "[FTC] 'tar' and nicotine results have been disclosed in advertising since 1971, pursuant to an informal *agreement between the Commission and the cigarette manufacturers.* . . ."

"Under the current *voluntary agreement between the Commission and the six major cigarette manufacturers*, cigarette advertisements disclose FTC test results, or, if no results exist for a new or reformulated cigarette, the manufacturer's test results

'by FTC method.'" (FTC Ex. 147, pp. 3, 5-6 n.2; emphasis added).

"B&W also misstates the facts when it avers that 'by its terms' the voluntary industry plan is predicated on the FTC's continuing testing of all cigarettes by its 'present methodology' (B&W Br. 9). No such provision appears in the joint industry letter." (p. 19).

The 1970 agreement says: "Under this program each company will disclose clearly and prominently for the variety of cigarettes advertised the values . . . contained in the Federal Trade Commission published test results, *under its present methodology*, in all advertising . . . .

"Necessarily, *the carrying out of this voluntary program is predicated upon the Commission continuing to test the advertised varieties of cigarettes* and to publish its results in the Federal Register . . . ." (6/25/82 London Aff't, Ex. G, pp. 1, 2; emphasis added).

The record contains additional support for Brown & Williamson's claim that the FTC testing and reporting program created rights and obligations for the tobacco companies. The Commission *admits* no cigarette manufacturer has been charged with misleading advertising when it has substantiated its "tar" claims by FTC test results. (Answer, p. 2, ¶ 15[c]). And it has long been the Commission's position that advertisements that correctly cite FTC test results will not be challenged by the Commission, but that any statement lacking such substantiation will be deemed confusing and misleading. (6/25/82 London Aff't, ¶ 13; Ex. D, p. 3).

In sum, by reason of both the 1970 agreement and the FTC's consistent course of conduct since 1967, Brown & Williamson has had, until now, the right to rely on FTC test method results

as the sole substantiation for claims regarding the "tar" and nicotine contents of its products; these FTC figures provided a virtual shield against the risk of—and an absolute defense in—private or governmental actions for misleading advertising. When the Commission on June 25 removed that shield, it changed Brown & Williamson's legal rights and obligations. Of course, it also drastically injured Brown & Williamson's competitive posture.

• • •

Brown & Williamson limited its appeal to the lack-of-finality ground upon which the district court relied. We urge this Court to reverse and remand rather than proceed to decide all the issues the lower court has not yet considered. But because the Commission has devoted the major portion of its brief to those other issues, we wish to correct some facts on those matters as well.

C. Notice

Brown & Williamson has raised, as a matter of due process, the lack of prior notice of the Commission's June 25 actions. The FTC now declares that:

> Regarding "advance notice" in this matter, B&W representatives were *fully* apprised of what might and indeed was likely to happen on no fewer than four separate and lengthy meetings with the Commission General Counsel and others during the week of June 25, 1982.

(FTC Br., p. 11 n.3). The Commission offers no record citation. There is none. The statement is false. If the Commission wishes to raise an issue of fact as to what its staff said prior to June 25, it must do so in the district court.

D. "Waiver"

The Commission also weaves a waiver/estoppel motif throughout its brief. Appellee writes:

> Throughout the investigation, B&W consistently opposed the use of public notice and comment on this question. At

> no time did B&W ever suggest that the Commission lacked legal authority to conduct its inquiry or that the general procedures followed by the Commission were unlawful or unfair. B&W made these arguments only after the Commission announced its conclusions.

(FTC Br., pp. 2-3; *see also id.*, p. 39 & n.20).

Brown & Williamson does not urge here that the Commission *inquiry* was unlawful for lack of authority or for failure to provide public comment. What we have claimed all along is that the Commission could not lawfully *act* to change its testing and reporting program without following required procedures. Brown & Williamson (and other companies) did oppose opening for public comment the amorphous, confidential FTC inquiry while it was still in an embryonic stage at the staff level (FTC Ex. 60, p. 2; FTC Ex. 51), but it never acquiesced in the Commission's current position that substantive changes in the program could be made unilaterally without the procedural protections required by law. (July 21, 1982 Affidavit of Ernest Pepples ("Pepples Aff't"), ¶¶ 2-3).

The Commission's suggestion that Brown & Williamson asserted a requirement for formal rulemaking only *after* June 25 is also false. The record shows that Brown & Williamson repeatedly voiced its position, long before June 25, that formal proceedings would be required for any change in the testing program:

> The Commission's alternative to obtaining industry agreement to a change in the test procedure would be to institute a formal proceeding, probably rulemaking, in order to seek to establish an enforceable disclosure program on the basis of its own preferred test procedure (if it finds one). (FTC Ex. 88, pp. 2-3) (letter of Ernest Pepples to Timothy Muris, dated February 22, 1982).

Brown & Williamson also insisted on receiving advance "notice of any proposed change [as] *a legal right, as well as a matter of fundamental fairness.*" (FTC Ex. 139 (Letter of Martin London to Chairman Miller, dated June 11, 1982, summarizing

arguments previously made to FTC), p. 4; emphasis added; *see also* FTC Ex. 86, p.2; Pepples Aff't, ¶¶2-6).

Moreover, Brown & Williamson repeatedly protested the unfairness of the FTC staff inquiry both orgally and in writing. (Pepples Aff't, ¶ 7; *see, e.g.*, FTC Exs. 86; 88; 108; FTC Ex. 110 (pp. 1, 6 of Martin London letter; pp. 38-44 of Brown & Williamson submission)).

The Commission cannot now convert Brown & Williamson's cooperation in a confidential staff inquiry affecting its vital commercial interests into endorsement of unlawful agency *action* taken after that inquiry concluded.

ARGUMENT

I

THE FTC'S ACTIONS ARE FINAL AND REVIEWABLE

The district court ruled that it lacked jurisdiction to review the FTC's June 25 actions because they lacked finality. The error we assign to that ruling was treated at length in our principal brief. As stated before, we suggest the district court's attention was diverted from the substance of what the FTC actually did (or, more correctly, proposed to do, in that its actions have been restrained by court order) to the FTC's proposed Federal Register notice *announcing* those actions.

The Commission would capitalize on that confusion by referring to its June 25 conduct as a mere announcement "disclosing its conclusion" about Barclay and seeking public comment. (FTC Br., pp. 3, 15, 20). But the FTC admits it determined to "stop the testing of Barclays" (FTC Br., p. 17), amend the December 1981 report (*id.*; FTC Br., p. 42 n.23), and reject FTC test results as substantiation for Barclay "tar" and nicotine claims. (*Id.*, p. 22). From those determinations Brown & Williamson requires relief.

The FTC effort to blur the nature of its June 25 actions cannot change the result. It is the substance and effort of the action, not its form, that determines the reviewability of the agency's conduct. And it is well settled that even announce-

ments, letters and other informal communications that affect a party's rights are reviewable agency actions.*

The few cases cited by the Commission (FTC Br., pp. 17, 20) to show that agency action is not always reviewable involve purely informational** or investigatory conduct.***

In any event, the FTC on June 25 did far more than issue an announcement or report. It retroactively rescinded Barclay's FTC ratings; it ceased testing and reporting the product; and it prohibited Barclay's future reliance on the FTC method. As the Commission itself recognizes, agency "actions having some dispositive effect on rights, privileges, duties or liabilities constitute judicially reviewable 'agency actions.' " (FTC Br., p. 17).**** The Commission's June 25 actions clearly fall within that rule.

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* *See, e.g., Fort Sumter Tours, Inc.* v. *Andrus*, 564 F.2d 1119, 1122-23 (4th Cir. 1977) (agency letters); *National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F.2d 689, 698-702 (D.C. Cir. 1971) (same); *Independent Broker-Dealers' Trade Ass'n* v. *SEC*, 442 F.2d 132, 137 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971) (agency requests for voluntary action); *Phillips Petroleum Co.* v. *FEA*, 435 F. Supp. 1239, 1245-48 (D. Del. 1977) (letter, brief and Federal Register notice).

** *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935, 940 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) (publication of a proposed rule); *FTC* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968) (press release concerning adjudication); *Hearst Radio, Inc.* v. *FCC*, 167 F.2d 225 (D.C. Cir. 1948) (publication containing alleged libel); *Pharmaceutical Mfrs. Ass'n* v. *Kennedy*, 471 F. Supp. 1224 (D. Md. 1979) (release of list of generic drugs).

*** *In re FTC Corporate Patterns Report Litigation*, 1977-2 Trade Cas. (CCH) ¶ 61,544 (D.D.C. 1977), *aff'd sub nom. Appeal of FTC Line of Business Litigation*, 595 F.2d 685 (D.C. Cir.), *cert. denied*, 439 U.S. 958 (1978) (use of compulsory process during agency investigation). *But see A.O. Smith Corp.* v. *FTC*, 396 F. Supp. 1108, 1112-13 (D. Del. 1975), *aff'd*, 530 F.2d 515 (3d Cir. 1976) (reaching a different result on similar facts).

**** For this reason, the FTC's reliance on Section 6 of the FTC Act, 15 U.S.C. § 46(a),(f) (FTC Br., p. 33), is entirely misplaced. We are not challenging the Commission's authority to conduct investigations, or to publish reports thereon. At issue here are discriminatory, retroactive changes

In the end, an agency's characterization of its conduct as being "non-final" does not resolve the question. The Court must make its own determination on the question of finality:

> The label an agency attaches to its action is not determinative. The action may be reviewable even though it is merely an announcement of a rule or policy that the agency has not yet put into effect.

Continental Air Lines, Inc. v. *CAB*, 522 F.2d 107, 124 (D.C. Cir. 1975) (footnotes omitted).

II

THIS COURT SHOULD REVERSE AND REMAND FOR PLENARY DISTRICT COURT CONSIDERATION OF BROWN & WILLIAMSON'S LEGAL CHALLENGES

Should the Court agree that the district court has jurisdiction to review the FTC's June 25th actions, it need go no further. The Commission, however, asks this Court to make findings and rule on the likelihood of sucess on the merits, irreparable injury, balance of hardships and the public interest—matters never addressed by the district court. Neither the law nor sound judicial policy supports the FTC's request.

The Commission cites *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n.6 (1970), to show that this Court is not jurisdictionally precluded from considering alternative grounds for upholding the decision below.* We agree. In the same *Dan-*

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to a government report that *itself* determines what a manufacturer may or may not lawfully advertise. Moreover, the Commission's "tar" and nicotine reports do not clearly fall within the Section 6 authorization to investigate and collect information concerning "the *organization, business, conduct, practices,* and *management* of any person, partnership, or corporation engaged in or whose business affects commerce . . . ." 15 U.S.C. § 46(a) (emphasis added). To our knowledge, the FTC never asserted until this litigation that these cigarette reports fall within the provisions of Section 6.

* The alternative grounds urged by the Commission, however, all go to the denial of a preliminary injunction, and not the dismissal of Brown & Williamson's Complaint.

dridge footnote, however, the Supreme Court counsels that "when a court from which a case has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." *Id.*; *see also Securities Investor Protection Corp.* v. *Morgan, Kennedy & Co., Inc.*, 533 F.2d 1314, 1322 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976). This circuit, too, has followed the policy of permitting the trial court to consider undecided issues in the first instance. *Clarke* v. *District Director of Internal Revenue Service*, 457 F.2d 1011 (6th Cir. 1972).*

This case is appropriate for remand. The FTC has raised fact issues regarding the 1970 agreement, notice, waiver and irreparable injury that require district court findings. Moreover, Brown & Williamson challenges the FTC's June 25th determinations on substantive as well as procedural grounds. The Commission agrees that "[r]esolution of this issue will require the district court to review an extensive evidentiary record" (FTC Br., p.23 n.13), collected in voluminous submissions filed with the district court. As in *Abbot Laboratories* v. *Gardner*, the "better practice" in dealing with a challenge to administrative action is to remand for a fuller consideration of the APA claims. 387 U.S. 136, 156 (1967).

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* The cases cited by the Commission (FTC Br., pp. 28-29) in urging this Court to rule on aspects of the case not yet considered by the district court are wholly inapposite. In *Maryland-National Capital Park & Planning Comm'n*, the court neither affirmed nor reversed the denial of preliminary relief, but remanded to the trial court for further consideration of a number of undecided issues. And none of the other cases cited at p. 28 of the FTC's brief presented a district court denial of preliminary relief based solely on jurisdiction. Nor did the appellate courts in those cases go on to find facts or rule on legal questions not considered below.

In *National Automatic Laundry*, there was no motion for preliminary relief, and the sole legal question involved statutory construction. 443 F.2d at 704. In *Independent Broker-Dealers*, the parties had cross-moved for summary judgment, 442 F.2d at 143, and there was no need for the appellate court to make findings of fact. In neither case was the court required to conduct a probing in-depth review of an extensive administrative record in order to resolve the issues presented.

The words of *Eikenberry* v. *Callahan*, 653 F.2d 632, 636 (D.C. Cir. 1981) aptly sum up the present situation: "Here the District Court's attention was focused almost entirely on the jurisdictional question. It is far better to return the case to the District Court for it to determine for the first time the merits of the case."

Nonetheless we respond briefly to the Commission's alternate grounds for affirmance.

III

THE COMMISSION'S JUNE 25 ACTIONS CONSTITUTED SUBSTANTIVE RULEMAKING

A. On June 25, the Commission Made Rules

The Commission acknowledges that agency action is not to be judged by talismanic labels, but by its "essential quality." *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1262 (D.C. Cir. 1973). As noted before, the "essential quality" of the FTC's June 25 actions is to rescind Barclay's past ratings, ban it from the government testing program utilized by all of its competitors, and expose Brown & Williamson to serious liability to the government and third parties in connection with Barclay advertising claims. Barclay loses the right to defend its advertising claims by citing to the FTC testing method, and is required to substantiate its 1 mg claims by other means. But the FTC concedes it knows of no other means.

The law is clear: prospective application of a changed standard to determine compliance with a statutory mandate is a *rule* for the purposes of the APA. *Guardian Federal Savings & Loan Ass'n* v. *Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 663-67 (D.C. Cir. 1978); *Dow Chemical, USA* v. *CPSC*, 459 F. Supp. 378, 392-93 (W.D. La. 1978) (granting a preliminary injunction for failure to provide notice and comment); *Clever Idea Company, Inc.* v. *CPSC*, 385 F. Supp. 688, 694 (E.D.N.Y. 1974) (granting preliminary relief for failure to comply with rulemaking requirements). So, too, is changing the system of reporting and interpreting factual data, particu-

larly when—as here—it has a significant effect on the entitlements or obligations of a party affected by that system. *Batterton* v. *Marshall*, 648 F.2d 694, 704-05 (D.C. Cir. 1980).

Finally, the Commission attempts to argue that its action doesn't "look" like a rule, since rules usually apply generally and involve broad policy considerations. We submit that the FTC's expulsion of Barclay from a program that applies to all other cigarettes, based on a new "human smoking" standard, *has* broad policy implications. The essential character of the agency's action is not altered by the fact that the newly-enunciated rule has thus far been applied to Barclay alone.

B. The Rules Promulgated by the Commission Are Not "General Statements of Policy"

The Commission contends that its June 25th action is not subject to the APA's procedural safeguards because it constitutes only a "general statement of policy" exempted from rulemaking under 5 U.S.C. § 553(b)(3). The FTC is in error: the June 25th determination is most decidedly a *substantive* rule.

In determining whether a challenged action is a "substantive" rule subject to rulemaking or some other pronouncement in one of the exempted categories in § 553(b)(3), the Court is not bound by the agency's characterization, *Detroit-Edison Co.* v. *EPA*, 496 F.2d 244, 249 (6th Cir. 1974), but must look to the real effect of the rule and the consequences that attach to it. *Cerro Metal Products* v. *Marshall*, 620 F.2d 964, 981 (3d Cir. 1980).

The leading articulation of the distinction between a substantive rule and a general statement of policy is set forth in *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (emphasis added; footnote omitted):

> A properly adopted substantive rule establishes a standard of conduct which has the force of law. . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency.

> A general statement of policy, on the other hand, does not establish a "binding norm." It is not finally determinative of the rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because *a general statement of policy only announces what the agency seeks to establish as policy.* A policy statement announces the agency's *tentative intentions* for the future.

Furthermore,

> *If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law.*

Guardian Federal Savings & Loan Ass'n v. *Federal Savings & Loan Insurance Corp., supra,* 589 F.2d at 666-67 (emphasis added); *see generally American Bus Ass'n* v. *United States,* 627 F.2d 525, 528-34 (D.C. Cir. 1980).

When this Court examines the "purpose or likely effect" of the Commission's action, it will be seen for what it "really is"—a substantive rule unlawfully promulgated.

The June 25 actions delisting Barclay from the December 1981 Report and ceasing to report Barclay's test results are hardly "tenative policy statements" announcing what the agency "seeks to establish." They expel Barclay from the 1970 disclosure program and immediately change Brown & Williamson's substantive right to advertise its cigarette as a 1 mg product.

The Commission contends that the June 25th announcement leaves room for agency discretion because it may still do any number of things, including adjudication, consideration of further evidence on Barclay's appropriate ranking, or "nothing at all." (FTC Br., p. 38). But the possibility the agency might or might not later sue to enforce its rule does not transform the rule into a "general statement of policy." If in any future enforcement proceeding that *might* be brought, the agency's present action will "narrow [the decisonmaker's] field of vi-

sion, minimizing the influence of other factors and encouraging decisive reliance upon factors whose significance might have been differently articulated had section [553] been followed", the action is a reviewable rule. *Pickus* v. *United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1975) (footnote omitted); *see also American Bus Ass'n, supra*, 627 F.2d at 530-34; *Guardian Federal Savings and Loan Ass'n, supra*, 589 F.2d at 666.

C. The FTC's Failure to Follow Rulemaking Procedures Harmed Brown & Williamson

It is undisputed in this litigation that the Commission failed to comply with APA rulemaking requirements before acting on June 25. The Commission now argues that Brown & Williamson lacks "standing" to complain of these violations of law because it was not harmed thereby. (FTC Br., pp. 39-41). That contention deserves short shrift.

During the inquiry, Brown & Williamson knew of its competitors' allegations and of the Commission's view, as expressed in December 1981, that a "serious question" as to Barclay's "tar" ratings existed. But knowledge of a broad inquiry into an alleged problem does not constitute "actual notice" of a proposed rule within the meaning of Section 553(b).*

Likewise, Brown & Williamson had no advance opportunity whatever to comment on the action taken on June 25th. Advance notice of *the proposed rule*, as opposed to the wide-ranging inquiry conducted beforehand, would have given Brown & Williamson the opportunity to focus its comments upon the specific remedial steps being contemplated by the agency, before they were enacted. *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 393 n.67 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

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* In each case cited by the FTC (FTC Br., p. 40), the complaining party either had been provided formal Federal Register notice of a proposed rule, or was on actual notice that the agency was contemplating the action ultimately taken.

The APA's notice and comment requirements are not sterile formalities which an agency can ignore at will. On the contrary, they serve a vital role in promoting fairness in the administrative process. *Ligon Specialized Hauler, Inc.* v. *I.C.C.*, 587 F.2d 304, 319 (6th Cir. 1978). Failure to provide these procedural safeguards contributed to the arbitrary and capricious nature of the Commission's determination in this case. For example, had Brown & Williamson and the public been given notice and the opportunity to comment on the June 25 actions, the Commission might well have come to recognize the irrationality of singling out Barclay for discriminatory treatment, while leaving other ventilated brands untouched. Similarly, the Commission's confusion as to the purpose of its testing and reporting program (pp. 21-22, *infra*) could have been averted. *See American Bus Ass'n* v. *United States, supra,* 627 F.2d at 533-34; *Guardian Federal Savings & Loan Ass'n, supra,* 589 F.2d at 668-69.

IV

THE COMMISSION'S JUNE 25 ACTIONS ARE ARBITRARY, CAPRICIOUS, AND AN ABUSE OF AGENCY DISCRETION

Brown & Williamson presented below a second, independent, basis upon which it was likely to succeed in proving the June 25 actions unlawful—the FTC's conduct was arbitrary, capricious, and an illegal abuse of agency discretion. In the district court, Brown & Williamson demonstrated that, upon conducting the "thorough, probing, in-depth review" and "searching and careful" factual inquiry mandated by *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 415-16 (1971), the court was likely to set aside the Commission's actions under 5 U.S.C. § 706 for the following reasons:

— they were illegally discriminatory, *Keen Transport, Inc.* v. *United States,* 446 F. Supp. 5, 8 (N.D. Ohio 1976), and impermissibly vague, *Iron Arrow Honor Society* v. *Hufstedler,* 499 F. Supp. 496, 503 (S.D. Fla. 1980),

aff'd, 652 F.2d 445 (5th Cir. 1981), *vacated on other grounds*, ____ U.S. ____, 102 S. Ct. 3475 (1982);

— the agency's action bore no rational connection to the record facts, *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962), and was unsupported by the evidence, *Portland Cement Ass'n* v. *Ruckelshaus, supra*, 486 F.2d at 393;

— the FTC departed from past practice without adequate reasons, *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-54 (1954); and

— the FTC's failure to give adequate notice of its action was unreasonable in light of the practicalities of the cigarette industry. *National Ass'n of Independent Television Producers and Distributors* v. *FCC*, 502 F.2d 249, 254-55 (2d Cir. 1974).

Rather than address these carefully documented flaws head-on, the Commission relies on self-serving mischaracterizations of past agency pronouncements on the cigarette testing program (FTC Br., pp. 45-46), selective and out-of-context references to portions of the evidence, and repeated allusions to a "Statement of Commission Action" (FTC Ex. 147) that itself suffers from the same evidentiary deficiencies as the FTC's June 25th actions.* No matter how creative, counsel's *post-hoc* rationalizations cannot save action that is unsupported and unlawful at the time when made. *Burlington Truck Lines, Inc.* v. *United States, supra*, 371 U.S. at 168-69; *Ace Motor Freight, Inc.* v. *ICC*, 557 F.2d 859, 864 (D.C. Cir. 1977). Should this Court decide to conduct the necessary in-depth review in the first instance, the most salient deficiencies of the Commission's action may be summarized briefly.

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* Although the FTC has insisted on calling it part of the "administrative record," the Statement of Commission Action upon which it so heavily relies was issued in July, 1982, *after* this litigation began. It was not before the agency when it made its determinations, and cannot substitute for evidence in support of its actions. In fact, because of the FTC's failure to engage in rulemaking procedures, Brown & Williamson has no way of determining what the administrative record is. Many exhibits submitted to the district court were never before seen by Brown & Williamson.

A. The FTC's Actions Are Illegally Discriminatory

The Commission and its consultants have identified a class-wide problem concerning the accuracy of the FTC's figures for all low "tar" cigarettes. All low-"tar" cigarettes can be smoked so as to yield substantially more "tar" to people than to the machine. (FTC Ex. 146, p. 4).

Despite this finding, no cigarette but Barclay was banished from the FTC program on the ground that human and machine smoking differ. Every other brand may continue to rely indefinitely on the present machine method. Only Barclay has been stripped of its FTC rating and relegated to a bureaucratic limbo "unless and until" the Commission changes the test method. Such patently discriminatory application of different rules to similarly situated parties is arbitrary and capricious administrative conduct. *See Keen Transport, Inc.* v. *United States, supra,* 446 F. Supp. at 8; *HC&D Moving & Storage Co.* v. *United States,* 298 F. Supp. 746, 751 (D. Hawaii 1969).

The FTC seeks to justify this disciminatory treatment on the ground that Barclay is unique; it first claims that dilution studies "showed that 100% of smokers experienced substantially reduced dilution when smoking Barclays in their lips as compared to smoking them with a cigarette holder similar to the holder used in the testing machine."* (FTC Br., p. 43). But the FTC also noted that as many as 50% of the smokers of all low "tar" cigarettes may be engaging in one or another form of compensatory dilution reduction which the FTC method does not measure. (FTC Ex. 147, p. 12). Indeed, an article by FTC consultant Dr. Kozlowski, circulated by the Commission during its inquiry, reports that "hole-blocking" occurs among

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* These dilution studies were submitted by Brown & Williamson's competitors. Brown & Williamson consistently maintained before the Commission that these studies were inherently biased, for the equipment on which they were performed was designed to foster compromise of Barclay's dilution system, and to prevent reduced dilution of any other ventilated cigarette. (*E.g.*, FTC Ex. 110, pp. 5-6, 8-16). At least one of the FTC's consultants acknowledged this bias. (FTC Ex. 61, p. 3). Neither the FTC nor the consultants conducted any studies of their own.

up to 69% of smokers of other brands. ("The Misuse of 'Less Hazardous' Cigarettes and Its Detection," p. 1202, appended to Kozlowski Report on Barclay, FTC Ex. 97). Given such evidence of widespread compensatory smoking of other low-"tar" brands, there is no rational, fair basis for taking drastic action against Barclay while leaving all other brands untouched. The consultants reported that "[a]ll air dilution filters . . . may pose a risk to the integrity of the relative ranking of tar yields throughout the entire tar scale" (FTC Ex. 61, p. 3), and that compensatory smoking may cause all "low nicotine cigarettes [to] yield misleading tar and nicotine levels in FTC tests." (FTC Ex. 101, p. 3). The Commission itself admits that, when delivery to actual smokers is considered, the FTC method may be inaccurate for ranking as well as for measuring *all* lower "tar" cigarettes. (FTC Br., p. 43). In light of the record, the Commission cannot credibly maintain that its June 25 actions against Barclay alone will prevent consumer deception and preserve the integrity of an otherwise accurate system.

B. The FTC's Actions Are Unsupported by the Evidence

Perhaps recognizing the inadequacy of the purported "quantitative" difference between Barclay and other low "tar" brands, the FTC adverts to a purported "qualitative" difference (FTC Ex. 147, p. 13): the FTC contends that reduced ventilation can be avoided by informed consumers of other brands, but occurs "inevitably" with Barclay. (*Id.*; FTC Br., p. 43). *There is not a shred of evidence in the "administrative record" to support this conclusion.*

This Court will search the voluminous exhibits filed by the Commission in vain for a study showing that "informed consumers" can avoid reduced dilution for other ventilated cigarettes, but not for Barclay. The FTC's claim that Barclay is "unique" in a manner that justifies discriminatory treatment has *no evidentiary support at all.*

C. The Commission's June 25 Actions Are Impermissibly Vague

The FTC now claims that "the ultimate purpose of its testing and reporting program is to rank cigarettes in terms of their *relative* delivery of 'tar' and 'nicotine' to *human* smokers." (FTC Br., p. 44).

When the current FTC method was adopted in 1967, however, the Commission acknowledged that it did not and could not measure delivery to people, and so stated in its accompanying Statement of Considerations:

> Thus, *the purpose of testing* is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine *the amount of tar and nicotine generated when a cigarette is smoked by machine* in accordance with the prescribed method.

(6/25/82 London Aff't, Ex. C, p. 3; emphasis added). Until June 25th, no tobacco company had to prove "human" delivery before it was permitted to cite FTC numbers in advertising. The Commission has now replaced a clear and objective machine standard with one that even *it* cannot articulate consistently. The Commission cannot decide whether it is measuring "tar" and nicotine "content" (FTC Ex. 146, p. 2), "delivery" (*id.*, pp. 3, 4), "inhal[ation]" (43 Fed. Reg. 11856 (1978), quoted at FTC Br., p. 45-46), or "ingest[ion]." (*Id.*). It interchanges these items if they all meant the same thing—which they most surely do *not*.

Given that there *is* no FTC-accepted way to measure what is "delivered" to the smoker, the Commission's action violates the fundamental fairness requirement of due process that "regulations which purport to govern conduct must give an adequate warning of what they command or forbid." *Diebold, Inc.* v. *Marshall*, 585 F.2d 1327, 1335 (6th Cir. 1978); *Longview Refining Co.* v. *Shore*, 554 F.2d 1006, 1014 n.20 (Temp. Emer. Ct. App.), *cert. denied*, 434 U.S. 836 (1977); *cf. Kay* v. *Mills*, 490 F. Supp. 844, 852 (E.D. Ky. 1980).

Because the Commission has failed to articulate the standard now governing its testing and reporting program, Brown & Williamson has been cut adrift, with no guidance for gaining Barclay's readmission or for designing products that will "pass" whatever new standard the Commission may choose to apply next.* This is precisely the kind of vague and uncertain agency action that constitutes an abuse of administrative discretion.

V.

THE PUBLIC INTEREST IS NOT HARMED BY PRELIMINARY RELIEF

The Commission claims that a preliminary injunction would disserve the public by stifling dissemination of the FTC's determination that Barclay is inaccurately ranked. (FTC Br., pp. 30-31). But the FTC has *already issued* a press release announcing its conclusions (FTC Ex. 145), and as the Commission concedes (FTC Br., p. 26), the FTC's findings and the issues in this lawsuit have been covered by the media. The FTC's public informational role is not compromised by the relief Brown & Williamson seeks.

Furthermore, the essence of Brown & Williamson's rulemaking claim is that the public comment should have been sought before, not after, the FTC's June 25 action. The public interest would be served, not harmed, by restraining the FTC from acting arbitrarily and without the procedures mandated by law.

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* Counsel for the Commission argues that, in light of the FTC's conclusions, the agency had but three options, and chose the only rational course. (FTC Br., p. 46). Yet if the FTC method cannot rank Barclay accurately, and if a class-wide problem exists as well, a fourth, perfectly reasonable option was open to the Commission: a rulemaking proceeding to change the FTC method *before* any action.

VI.

THE PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE INJURY

Finally, we cannot fathom the Commission's contention that Brown & Williamson "cannot argue convincingly that it will suffer irreparable injury in the marketplace." (FTC Br., p. 32). Brown & Williamson's principal brief sets out at length the harm to Brown & Williamson caused by the FTC's June 25th actions. (B&W Br., pp. 35-43). The extent and irreparable nature of the injury were well documented before the district court (Affidavits of Scott A. Wallace, sworn to June 25, 1982, and Ernest Pepples, sworn to September 27, 1982). Nothing in the record controverts that showing of irreparable harm. Moreover, in issuing the injunction pending appeal, the district court expressly determined that interim relief was "necessary . . . to prevent the occurrence of immediate and irreparable injury" to Brown & Williamson (Order, September 27, 1982), and this Court upheld that order.

The FTC's actions place Brown & Williamson at a severe disadvantage in the marketplace, its competitors free to exploit the excision of Barclay's FTC numbers. Brown & Williamson faces the damning accusation that its product is a "cheat," booted from a long-standing governmental program. Finally, absent interim relief, Brown & Williamson faces exposure to civil liability that never before existed, and that the FTC is powerless to waive.* Given the undisputed importance of the

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* The Commission claims that its purported "flexibility" with respect to permissible "interim" advertising alleviates Brown & Williamson's concerns. (FTC Br., pp. 31-32). Would that it were so. The Commission's July 15, 1982 letter to Brown & Williamson (FTC Ex. 148) only highlights how much Brown & Williamson's previous right to rely on the present testing and reporting systems has been eroded. First, the clear import and effect of that letter is to inform Brown & Williamson that the Commission deems the former's future reliance on the present method as likely to be "deceptive and unfair" under Section 5 of the FTC Act, 5 U.S.C. § 45(a). Second, that letter mentions a number of advertising options for Brown & Williamson, not one of which includes advertising in the same fashion as Brown & Williamson's

FTC "tar" and nicotine numbers to the cigarette industry, the June 25 Commission action wreaks grave and irreversible harm upon Brown & Williamson.

CONCLUSION

For all the reasons discussed above and in Brown & Williamson's principal brief, we urge this Court to reverse the decision below, reinstate the Complaint, and maintain the interim relief now in place pending the decision of Brown & Williamson's motion for a preliminary injunction upon remand.

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competitors—by reliance on the established FTC method. Finally, the options the FTC proposes require Brown & Williamson to forego its claim that Barclay is an ultra-low "tar" cigarette.